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Dockets: 2008-2759(IT)G
2008-2779(IT)G
2014-3231(IT)G

BETWEEN:

V. ROSS MORRISON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2015-858(IT)G

AND BETWEEN:

DIETER EISBRENNER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Owen J.

I. Introduction

[1] These are appeals by Mr. V. Ross Morrison and Mr. Dieter Eisbrenner (the "Appellants") of reassessments fixing the income tax consequences of their participation in pharmaceutical donation programs (the "Programs") that existed from 2003 through 2008. Mr. Morrison participated in the Canadian Gift Initiatives donation program (the "CGI Program") in 2003 and in the Canadian Humanitarian Trust donation program (the "CHT Program") in 2004 and 2005 and Mr. Eisbrenner participated in the CHT Program in 2005. The appeals were heard on common evidence.

[2] Mr. Morrison is a lawyer and represented himself with the assistance of an associate. Mr. Eisbrenner was represented by counsel appointed shortly before the hearing.

[3] The week before the commencement of the hearing of these appeals, scheduled for four weeks, Mr. Rosen discontinued his appeal. Mr. Rosen was the owner of World Health Initiatives Inc. ("WHI"), the creator and promoter of the CHT Program. Following the receipt of affidavit evidence of difficulties encountered in serving Mr. Rosen in person with a subpoena, I issued an Order in favour of the Respondent allowing for substituted service of the subpoena.

[4] At the commencement of the hearing of the appeals, Mr. Miller, a former employee of Canadian Donations Limited ("CDL"), the marketer of the CGI Program and the CHT Program, discontinued his appeal.

[5] The Appellants called the following witnesses:

- Mr. Morrison.
- Mr. Eisbrenner.
- Mr. Eric Richard Miller, an employee of CDL in 2004, 2005 and 2006.
- Mr. Kevin O'Brien, the executive director of Canadian Physicians for Aid and Relief ("CPAR") during the taxation years in issue in these appeals.
- Mr. Robert Edison Barnett, the chairman of the board of Escarpment Biosphere Foundation ("EBF") during the taxation years in issue in these appeals.
- Ms. Shirley Gremyachev, the founder and a director of Universal Aide Society.
- Mr. Max Zive, a pharmacist and the president of Zipharm International Inc., a consultant in respect of the CGI Program and the CHT Program.

- Mr. Philip J. Rosenberg, a pharmacist and a consultant in respect of the CHT Program.

[6] The Respondent called the following witnesses:

1. Mr. Ronald Eugene Monahan, a large file auditor with the Canada Revenue Agency (the "CRA") and the lead auditor of the individuals who participated in the CHT Program in 2004, 2005 and 2006.

2. Mr. Richard Alan Wilson, a tax avoidance auditor with the CRA and the lead auditor of the individuals who participated in the CGI Program after the initial lead auditor retired in September 2006.

3. Mr. Claude Senecal, an exchange of information officer with the Canadian Competent Authority (the "CCA").

[7] The Respondent also called Professor Ernst Rudolf Berndt, Ph.D., who was qualified as an expert on measuring values for generic pharmaceuticals.

A. The Assumptions of Fact of the Minister of National Revenue

[8] In reassessing the Appellants in respect of their participation in the CHT Program, the Minister of National Revenue (the "Minister") made assumptions of fact that were not addressed by the evidence adduced by the Appellants. The Minister's assumptions of fact as set out in the Minister's pleadings are reproduced in full in Appendix A to these Reasons.

II. The Evidence

A. The CGI Program

[9] Mr. Morrison participated in the CGI Program in 2003. Mr. Eisbrenner did not participate in the CGI Program.

[10] The promoter of the CGI Program was Canadian Gift Initiatives Inc. ("CGI"). CGI retained CDL to market the CGI Program.

[11] Mr. Morrison entered into a purchase agreement with CGI made as of the 30th day of September 2003 (the "CGI Agreement") whereby he agreed to

purchase "certain goods . . . set out in Schedule A hereto." from CGI for a net purchase price of $9,500.[1]

[12] Mr. Morrison testified that someone other than himself filled in most of the handwritten information in the CGI Agreement[2] and that the pharmaceuticals were not identified in the purchase agreement when he signed the agreement.[3] Mr. Morrison understood that the pharmaceuticals would be a combination of the medicines listed in the CGI Program promotional materials.[4]

[13] In section 4 of the CGI Agreement, an "X" in a box indicates that Mr. Morrison intends to donate the pharmaceuticals to a registered charity and that he appoints CGI to facilitate the donation. The registered charity is not named in the CGI Agreement.[5]

[14] Mr. Morrison paid the $9,500 purchase price by a cheque dated October 7, 2003 made out to a law firm. The cheque was cashed on October 30, 2003.[6]

[15] Mr. Morrison executed a deed titled "DEED OF GIFT TO A CHARITY" dated November 7, 2003 in favour of EBF (the "CGI Deed").[7] The name of the charity and the date were written by someone other than Mr. Morrison.[8]

[16] Mr. Morrison did not know if the CGI Deed was attached to the CGI Agreement.[9] Mr. Morrison also did not know whether he signed the CGI Agreement and the CGI Deed on the same date, but he conceded that it was possible even though the documents had two different dates (i.e., September 30 and November 7).[10]

[17] EBF issued Mr. Morrison a tax receipt dated November 11, 2003 in the amount of $56,502.80.[11] Attached to the receipt was an invoice dated

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[1] Exhibit R-2. The purchase price was described in section 2 of the CGI Agreement as $10,000 less a discount of $500.
[2] Lines 11 to 14 of page 76 of the Transcript of Proceedings (the "Transcript").
[3] Lines 18 to 21 of page 77 of the Transcript.
[4] Lines 26 to 28 of page 71 and lines 1 to 7 of page 72 of the Transcript and Exhibit R-5, Tab B.
[5] Lines 10 to 24 of page 78 of the Transcript.
[6] Lines 9 to 28 of page 81 and lines 1 to 13 of page 82 of the Transcript and Exhibit R-3.
[7] Lines 25 to 28 of page 78 and line 1 of page 79 of the Transcript and Exhibit R-9.
[8] Lines 22 to 28 of page 79 of the Transcript.
[9] Lines 21 to 28 of page 80 and lines 1 to 8 of page 81 of the Transcript.
[10] Lines 14 to 27 of page 82 of the Transcript.
[11] Exhibit R-4.

November 5, 2003 and an undated document titled "Donation Value Schedule" identifying certain pharmaceuticals and stating the value attributed to those pharmaceuticals. Mr. Morrison did not know the precise pharmaceuticals he had purchased or the value of those pharmaceuticals until he received the tax receipt.[12]

[18] In his 2003 tax return,[13] Mr. Morrison claimed the amount stated in the tax receipt as a gift to EBF and reported a capital gain of $47,002.80 (i.e., $56,502.80 - $9,500) from the disposition of the pharmaceuticals identified on the attachments to the tax receipt.

[19] Mr. Wilson testified that the CRA did not challenge Mr. Morrison's position that he purchased pharmaceuticals from CGI and that he transferred those pharmaceuticals to EBF.[14] However, the CRA did challenge the value of the pharmaceuticals based on an appraisal obtained from a valuator employed by the CRA.[15] The CRA reassessed Mr. Morrison to deny all but $1,759.35 of the gift to EBF claimed by Mr. Morrison in his 2003 tax return. Mr. Morrison did not lead expert evidence regarding the value of the pharmaceuticals. Instead, Mr. Morrison relied on the valuations obtained by the CGI Program, which used values from the Ontario drug benefit formulary.[16]

[20] Mr. Morrison testified that he was aware of the possible tax benefit associated with participating in the CGI Program, but that the tax saving was not his primary reason for participating in the program.[17] Mr. Morrison described his motivation as follows:

> What motivated me was the opportunity to participate in a program which involved essential medicines, pharmaceuticals, if you will, being distributed to persons in need in third-world countries.[18]

B. The CHT Program

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[12] Lines 17 to 25 of page 71, lines 22 to 28 of page 77 and lines 1 to 9 of page 78 of the Transcript.
[13] Exhibit R-1.
[14] Lines 22 to 28 of page 1332 and lines 1 to 7 of page 1333 of the Transcript.
[15] Lines 8 to 20 of page 1333 of the Transcript.
[16] Lines 3 to 22 of page 886 of the Transcript and Exhibit A-58.
[17] Lines 25 to 28 of page 95 and lines 1 to 2 of page 96 of the Transcript.
[18] Lines 8 to 11 of page 96 of the Transcript.

[21] The CHT Program replaced the CGT Program after 2003 because of proposed amendments to the *Income Tax Act* (the "ITA") released in early December 2003 that addressed so-called "buy low gift high" arrangements.[19]

[22] Mr. Monahan testified that based on the tax returns filed with the CRA and the CRA's audit of the CHT Program, there were approximately 6,500 participants in the CHT Program in 2004, 10,000 in 2005 and 10,500 in 2006.[20] The amount of cash and in-kind gifts claimed by participants in the CHT Program during those three years was approximately $222 million and $600 million, respectively.[21]

[23] Mr. Miller testified that Stephen Rosen structured the CHT Program and that over time he became the figurehead of the program.[22] Starting in 2004, Mr. Miller organized public and private events to market the CHT Program to individuals.[23] Stephen Rosen spoke at almost all these events.[24] From 2004 to 2006, CDL had agreements with at least 200 authorized representatives (agents), who solicited participants for the CHT Program.[25]

[24] The promotional materials for the CHT Program, which included at least one professionally produced video presentation, suggest that pharmaceuticals were distributed to great effect in Vietnam, Ecuador, Malawi and Sub-Saharan Africa among other places.[26]

[25] The Respondent's counsel indicated during the hearing that the Respondent does not dispute that pharmaceuticals existed and were distributed outside Canada. The Respondent disputes that the various[27] Canadian Humanitarian Trusts ("CHT") acquired pharmaceuticals that were distributed to the Appellants.[28]

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[19] In general terms, the amendments deemed a gift of purchased property to be made at the cost of the property to the donor subject to certain exceptions.
[20] Lines 2 to 26 of page 1162 of the Transcript. Mr. Miller testified to similar numbers of participants: lines 13 to 21 of page 311 of the Transcript.
[21] Lines 24 to 28 of page 1164, page 1165 and lines 1 to 9 of page 1166 of the Transcript.
[22] Lines 3 to 17 of page 312 of the Transcript.
[23] Lines 10 to 28 of page 291, pages 292 to 304 and lines 1 to 15 of page 305 of the Transcript.
[24] Lines 12 to 15 of page 298 and lines 17 to 25 of page 299 of the Transcript.
[25] Lines 2 to 27 of page 285 of the Transcript. The number of representatives increased each year.
[26] For example, Exhibits A-18 (1 page brochure entitled "Your Donations Working") and A-34 (CD of promotional video). The video was provided to authorized representatives of the CHT Program and was played at marketing events: lines 24 to 27 of page 310 of the Transcript.
[27] The evidence indicates that there were several CHT trusts, each distinguished only by the roman numerals after the name: Exhibits A-24, A29 and R-20. For ease of reference, I will refer to the CHT trusts in the CHT Program in 2004 and 2005 as CHT.
[28] Lines 4 to 9 of page 583 and lines 4 to 9 of page 584 of the Transcript.

[26] Mr. Morrison and Mr. Eisbrenner participated in the CHT Program in 2004 and 2005. These appeals do not address Mr. Eisbrenner's participation in 2004. A portion of the amount of the gifts claimed by Mr. Eisbrenner in his 2005 income tax return was carried over to his 2006 taxation year.[29]

[27] According to the promotional materials for the CHT Program, the CHT Program involved the following elements:[30]

- Client makes a cash donation to a registered charitable foundation (Foundation A)
- Client applies to WHI to be considered as a potential Class A beneficiary of CHT
- CHT transfers title to World Health Organization ("WHO") Essential Medicine Units to the successful applicant (Client)
- Client chooses to donate WHO Essential Medicine Units ("WHOEM Units") to a registered charitable foundation (Foundation B)
- Foundation A issues a tax receipt for the cash donation; Foundation B issues a tax receipt for the net value[31] of the WHOEM Units
- WHOEM Units are distributed to those in need in developing countries

[28] The promotional materials do not explain how the pharmaceuticals make their way to CHT for distribution to Class A beneficiaries. Mr. Miller identified Crunin Investments ("Crunin") as the settlor of CHT[32] but none of the witnesses were able to address how Crunin acquired pharmaceuticals purportedly settled on CHT.

[29] Certain Canadian registered charities participated in the CHT Program in one of three possible roles.[33] The first role was as a cash charity (i.e., a Foundation

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[29] Exhibit A-33, pages 10 and 13. Mr. Eisbrenner appealed the reassessment of his 2005 and 2006 taxation years.
[30] Exhibit R-11 at tab B and Exhibit A-13.
[31] The promotional materials indicated that there was a lien on the WHOEM Units at the time they were distributed to Class A beneficiaries.
[32] Lines 11 to 17 of page 321 of the Transcript.
[33] See, generally, the testimony of Mr. Miller at lines 22 to 28 of page 281, pages 282 through 284 and line 1 of page 285 of the Transcript.

A). These charities received cash donations from participants and issued tax receipts to participants. Mr. Miller testified that Alberta Distribution Relief Agency ("ADRA"), Living Waters Ministry Trust and Phoenix Community Works Foundation ("PCWF") were cash charities during 2004 through 2006.[34]

[30] The second role was as an in-kind charity (i.e., a Foundation B). These charities received in-kind donations from participants in the form of certificates issued by CHT and issued tax receipts to participants. Mr. Miller testified that Choson Kallah Foundation ("CKF"), Meoroth Charitable Foundation ("MCF"), Resources for Life Foundation and New Hope Ministries Institute were in-kind charities during the years 2004 through 2006.[35] The Minister assumed as a fact that Adventist Society International was also a cash charity.[36]

[31] The third role was as a distributing charity. These charities received cash donated to the cash charities and the certificates donated to the in-kind charities. Mr. Miller testified that CPAR and EBF were distributing charities during 2004 through 2006.[37] The distributing charities did not issue tax receipts.

[32] The distributing charities and WHI entered into agreements regarding the cash and in-kind receipts of those charities. The agreements provided that the distributing charity would deposit all monies received in a segregated trust account held by a law firm and that the charity would execute an irrevocable letter of direction instructing the law firm to pay the monies received as follows:

- 1% to the general account of the distributing charity;
- 1.57% of the total unencumbered value of the pharmaceuticals the distributing charity receives to a named in-kind charity;
- 1% (plus applicable GST) to WHI as fees for its services;
- 32.68% (plus applicable GST) to WHI for solicitation of funds and pharmaceuticals; and

[34] Lines 4 to 13 of page 424 of the Transcript.
[35] Lines 14 to 28 of page 424 and lines 1 to 4 of page 425 of the Transcript.
[36] See, for example, paragraph 18(t) of the Reply to Mr. Eisbrenner's Notice of Appeal for his 2005 and 2006 taxation years (the "Eisbrenner Reply").
[37] Lines 5 to 11 of page 425 of the Transcript.

- the balance to the trust account of WHI to cover all costs associated with the distribution of pharmaceuticals.[38]

[33] The Minister assumed as a fact that the charities involved in the CHT Program collectively retained no more than 3.3% of the cash received by the cash charities in 2004 and no more than 3% of the cash received by the cash charities in 2005 and 2006.[39] Counsel for the Respondent asked Mr. Miller if the cash charities retained 1% of the cash they received from participants but Mr. Miller testified that he had no knowledge of the arrangements with the cash charities.[40]

[34] The documentation effecting an individual's participation in the CHT Program consisted of the following (collectively, the "CHT Documents"):

- A Class A beneficiary application made to WHI (an "application")

- A certificate issued by CHT (a "certificate") stating that the person named on the certificate had been named a Class A beneficiary of CHT and was the owner of a specified number of WHOEM Units subject to a lien described in a page attached to the certificate that also included language for up to three transfers of title. The certificate states that a description of the WHOEM Units is set out in a schedule to the certificate

- A deed of gift appointing WHI as agent to take all steps required to effect the gift of the WHOEM Units to a donee

[35] Mr. Morrison and Mr. Eisbrenner each testified that there was no connection between the cash donation identified in the promotional materials as "Stage 1" and the balance of the steps identified in the promotional materials as "Stage 2", and that there was no obligation to make a cash donation to be considered as a potential Class A beneficiary of CHT.[41]

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[38] Lines 26 to 28 of page 502, lines 1 to 7 of page 503, lines 3 to 10 of page 515, lines 1 to 20 of page 720 and lines 9 to 18 of page 743 of the Transcript and Exhibits A-39, A-41, A-63 and A-67. The agreements with the law firms are Exhibits A-40, A-43, A-61 and A-62.

[39] Paragraph 18(ee) of the Eisbrenner Reply, paragraph 14(cc) of the Second Amended Reply to Mr. Morrison's Notice of Appeal for his 2004 taxation year (the "Morrison 2004 Reply") and paragraph 13(cc) of the Reply to Mr. Morrison's Notice of Appeal for his 2005 taxation year (the "Morrison 2005 Reply") (I will refer to the Morrison 2004 Reply and the Morrison 2005 Reply collectively as the "Morrison Replies").

[40] Lines 23 to 28 of page 434 and lines 1 to 3 of page 435 of the Transcript.

[41] Lines 17 to 28 of page 128, lines 1 to 23 of page 129, lines 12 to 26 of page 249, lines 26 to 28 of page 250, lines 1 to 21 of page 251 and lines 1 to 22 of page 256 of the Transcript.

[36] Mr. Morrison testified that he made a cash donation in 2004 and in 2005 and Mr. Eisbrenner testified that he made two cash donations in 2005. These cash donations were paid by cheque.[42]

[37] The Appellants' cheques indicate that these cash donations were paid in trust to a law firm on behalf of the recipient cash charity. The law firms named as payee on the Appellants' cheques are the same as the law firms that agreed to maintain trust accounts for CPAR and EBF.[43] Mr. Miller testified that he was aware that these two law firms acted in this capacity for the cash charities.[44]

[38] The Appellants each submitted applications to WHI to be appointed Class A Beneficiaries of CHT and to receive WHOEM Units with a minimum stipulated value.[45] The applications submitted by the Appellants did not state the stipulated value of the WHOEM Units, which was filled in by someone other than the Appellants.[46] The Appellants did not know how the stipulated value was determined.[47] The Appellants testified that they were not guaranteed to be appointed a Class A beneficiary of CHT and Mr. Miller testified that the authorized representatives were instructed not to provide such guarantees to participants.[48]

[39] CHT issued certificates to each of the Appellants stating that they were accepted as Class A beneficiaries of CHT and were entitled to receive a stipulated number of WHOEM Units subject to a lien.[49] The page attached to the certificates describes the lien on the WHOEM Units and states that title to the WHOEM Units is being transferred first to the in-kind charity named on the page and then from that charity to one of the distributing charities. The certificates in evidence have a

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[42] Exhibits R-14, A-19 and A-21. The cheque representing Mr. Morrison's cash donation for 2005 was not put in evidence but Mr. Morrison testified that a cheque for the amount of the tax receipt he received would have been made out to a lawyer in trust for the charity issuing the receipt: lines 15 to 18 of page 142 of the Transcript.

[43] Exhibits A-40, A-43, A-61 and A-62. The law firms were Daigle & Hancock LLP ("D&H LLP") and Jonathan J. Sommer, Barrister & Solicitor.

[44] Lines 27 to 28 of page 318 and lines 1 to 4 and 22 to 27 of page 319 of the Transcript.

[45] Exhibit R-15 for Mr. Morrison and Exhibits A-23 and A-28 for Mr. Eisbrenner. Mr. Morrison's application for 2005 was not put in evidence.

[46] Lines 26 to 28 of page 124, lines 1 to 3 of page 125, lines 2 to 5 of page 215, lines 21 to 22 of page 257 and lines 10 to 14 of page 260 of the Transcript. Mr. Morrison's application for 2005 was not put in evidence.

[47] Lines 8 to 11 of page 126, lines 21 to 28 of page 257, line 1 of page 258 and lines 15 to 20 of page 260 of the Transcript.

[48] Lines 2 to 10 of page 130, lines 8 to 22 of page 256, lines 24 to 28 of page 369 and lines 1 to 15 of page 370 of the Transcript.

[49] Exhibit R-20 for Mr. Morrison and Exhibits A-24 and A-29 for Mr. Eisbrenner. Mr. Morrison's certificate for 2005 was not put in evidence. The promotional materials for the CHT Program suggest that the lien was equal to 16% of the value attributed to the WHOEM Units: Exhibit A-16.

"discharged" stamp on the page with the name KP Innovispharm Ltd. ("KP Innovispharm").

[40] The Appellants had no knowledge of why there was a lien on the WHOEM Units.[50] Mr. Barnett testified that EBF received the certificates representing the WHOEM Units without the discharge stamp.[51] Mr. O'Brien and Mr. Barnett testified to their understanding that the certificates with the two transfer of title sections completed represented the distributing charities' ownership of pharmaceuticals.[52] Mr. O'Brien testified that during 2004 through 2006 CPAR received "boxes and boxes of certificates".[53]

[41] The Appellants each executed deeds of gift.[54] The name of the donee was filled in by someone other than the Appellants after the deeds of gift were submitted to WHI.[55] Mr. Eisbrenner explained that at the time the deeds of gift were submitted to WHI, he would not have known who he wanted to donate to or whether he was a Class A beneficiary.[56]

[42] A relative of Mr. Eisbrenner completed his second application and second deed of gift for 2005 and issued the cheque in payment of Mr. Eisbrenner's second cash donation. Mr. Eisbrenner testified that he proceeded in this fashion because he was not able to complete the application in time.[57]

[43] The Appellants received tax receipts for each of the cash and in-kind donations and claimed the amounts stated on the receipts as gifts in their tax returns for the relevant taxation years.[58] The amounts of the cash gifts reported by the Appellants in their tax returns for 2004 and 2005 were as follows:

Name of Appellant	2004	2005[59]

[50] Lines 19 and 20 of page 126, lines 26 to 28 of page 127, lines 5 to 28 of page 216 and lines 1 to 16 of page 217 of the Transcript.
[51] Lines 25 to 28 of page 725 and lines 1 to 3 of page 726 of the Transcript.
[52] Lines 12 to 28 of page 595, page 596, lines 2 to 7 of page 606, lines 9 to 21 of page 710, lines 17 to 26 of page 724 and lines 9 to 18 of page 744 of the Transcript.
[53] Lines 26 to 28 of page 597 of the Transcript.
[54] Exhibit R-17 for Mr. Morrison and Exhibits A-25 and A-30 for Mr. Eisbrenner. Mr. Morrison's deed of gift for 2005 was not put in evidence.
[55] Lines 18 to 28 of page 131, lines 1 to 10 of page 132, lines 24 to 28 of page 220 and lines 1 to 13 of page 221 of the Transcript.
[56] Lines 24 to 28 of page 220, lines 1 to 13 of page 221 and lines 9 to 20 of page 228 of the Transcript.
[57] Lines 4 to 16 of page 225 of the Transcript.
[58] The 2004 and 2005 income tax returns of Mr. Morrison are Exhibits R-10 and R-21, respectively, and the 2005 income tax return of Mr. Eisbrenner is Exhibit A-33.
[59] The Minister allowed the charitable donation tax credits for the Appellants' cash donations in 2005.

Morrison	$15,350	$15,075
Eisbrenner	N/A	$39,966

[44] The amounts of the in-kind donations reported by the Appellants in their tax returns for 2004 and 2005 were as follows:[60]

Name of Appellant	2004	2005
Morrison	$41,108.82	$ 37,815.15
Eisbrenner	N/A	$124,459.25

[45] The receipts for the in-kind donations included a schedule that listed pharmaceuticals by name and the value attributed to those pharmaceuticals.[61] Mr. Miller testified that Matthew Rosen prepared the tax receipts issued by the cash and in-kind charities but to his knowledge he did not sign those tax receipts.[62]

[46] Mr. Morrison was not aware of the specific pharmaceuticals purportedly distributed to him by CHT until he received a tax receipt from the in-kind charity.[63] Mr. Eisbrenner did not agree with counsel for the Respondent that the receipts were the first indication of the precise pharmaceuticals purportedly distributed to him by CHT, but he could not recall when he obtained that information.[64]

[47] The value attributed to the in-kind donations was based on one of three methodologies. These methodologies were described as follows in general terms in a letter from Philip J. Rosenberg to Stephen Rosen dated July 15, 2004:

> Following the determination of the safety and efficacy of the pharmaceuticals each product is best valued by making use of the Ontario Drug Benefit Formulary/Comparative Drug Index, as prescribed under the Ontario Drug Benefit Act (Ontario Formulary Value) or the price ascribed to the pharmaceutical by the two major Canadian pharmaceutical wholesalers (McKesson Canada, and Kohl & Frisch Limited), utilizing whichever price is more. Where no such prices are available, the valuation is then derived from the 'Red Book AWP', less 25%. (The Patented Medicine Pricing Review Board (PMPRB), an independent quasi-judicial body created by Parliament in 1987, under the Patent Act, to protect consumer interests and to contribute to Canadian health by ensuring that prices charged by manufacturers of patented medicines are not excessive, utilizes the Red Book as one of its two references. PMPRB also references the US

[60] The Minister denied the charitable donation tax credit for the Appellants' in-kind donations in both years.
[61] Exhibits A-26, A-31 and R-19.
[62] Lines 8 to 28 of page 394 and lines 1 to 12 of page 395 of the Transcript.
[63] Lines 8 to 17 of page 131 of the Transcript.
[64] Lines 15 to 28 of page 265, page 266 and lines 1 to 13 of page 267 of the Transcript.

> government Federal Supply Scheduling Pricing which is not relevant or applicable in this case).[65]

[48] Mr. Rosenberg prepared product-specific per molecule (per dose) appraisals for CHT based on lists of pharmaceuticals provided by Matthew Rosen, who was Mr. Rosenberg's contact in the CHT Program.[66] Mr. Rosenberg chose to rely on the Ontario Drug Benefit Formulary/Comparative Drug Index as the default reference to value the pharmaceuticals because the donor was a Canadian resident and the donee was a Canadian charity.[67]

[49] In cross-examination, Mr. Rosenberg acknowledged that he was not a certified valuator and that he had no experience valuating pharmaceuticals for use in markets outside Canada.[68] Mr. Rosenberg agreed that he did not receive any documentation to demonstrate that the pharmaceuticals identified by Matthew Rosen were approved for import and sale in Canada and that he knew the pharmaceuticals were not approved for import and sale in Canada.[69] Mr. Rosenberg did not ask for or review the invoices for the purchases of the pharmaceuticals and agreed that he had no interest in the actual purchase price of the pharmaceuticals.[70]

[50] Mr. Morrison testified that although he believed pharmaceuticals were distributed in third-world countries and was motivated to participate by that belief, he did not independently confirm that belief, he had no knowledge of whether the pharmaceuticals in fact existed and he had no knowledge of whether the charities took possession of the pharmaceuticals.[71]

[51] Mr. Eisbrenner testified that he relied on the certificates as proof that the pharmaceuticals were transferred to the charity named on the page attached to the certificate and that he had no information outside that stated in the CHT Program materials.[72]

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[65] Exhibit R-12. A more detailed description of Mr. Rosen's approach to the valuation of the pharmaceuticals is found in Exhibit A-78.
[66] Lines 15 to 28 of page 1021 and line 1 of page 1022 of the Transcript and Exhibit A-80.
[67] Lines 25 to 28 of page 993 and lines 1 to 9 of page 994 of the Transcript.
[68] Lines 2 to 8 of page 1012 of the Transcript.
[69] Lines 17 to 24 of page 1018 of the Transcript. Section 3 of the Class A beneficiary application (Exhibits A-23 and A-28) states that the applicant "may not be able to import" the pharmaceuticals into Canada.
[70] Lines 24 to 28 of page 1019 and lines 1 to 10 of page 1020 of the Transcript.
[71] Lines 12 to 28 of page 123 and lines 1 to 13 of page 124 of the Transcript.
[72] Lines 9 to 28 of page 268, page 269 and lines 1 to 3 of page 270 of the Transcript.

[52] Mr. Zive testified that he inspected pharmaceuticals identified with the CHT Program at a warehouse in Holland and that he visited three of the manufacturers supplying the pharmaceuticals to determine if they were following good manufacturing practices but not to inspect pharmaceuticals identified with the CHT Program.[73] Mr. Zive and Mr. O'Brien testified that they conducted a monitoring trip to Vietnam[74] and Mr. Miller testified that he visited Ecuador in 2006.[75]

[53] The Appellants had no knowledge regarding the workings of the CHT Program beyond what was stated in the promotional materials for the program, the CHT Documents and the tax receipts. None of the witnesses, including Mr. O'Brien and Mr. Barnett,[76] had any first-hand knowledge of who purchased the pharmaceuticals from the manufacturers or who (if anyone) transferred pharmaceuticals to CHT for distribution to Class A beneficiaries.

[54] Counsel for Mr. Eisbrenner attempted to track down several individuals associated with the CHT Program but with no success. Stephen Rosen was served with a subpoena by the Respondent, but he did not attend the hearing and I was not asked to issue a bench warrant for his arrest.

[55] Mr. Monahan testified that he was able to identify pharmaceuticals associated with the CHT Program based on materials provided by counsel for WHI cross-referenced against other information obtained through the course of the CRA audit of the CHT Program.[77] Mr. Monahan used this information to identify manufacturers and issue requests to those manufacturers for copies of invoices for the pharmaceuticals identified with the CHT Program.[78] In response, Mr. Monahan received copies of invoices from the manufacturers (the "Invoices").[79] Mr. Monahan testified that based on the Invoices the only purchasers of the pharmaceuticals that the CRA identified with the CHT Program were MedPharm, Amstelfarma (the owner of the warehouse in Holland) and PK Bonapharm.[80] In the course of the audit, the CRA did not find any evidence that the pharmaceuticals

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[73] Lines 18 to 28 of page 890, page 891, lines 1 to 10 of page 892, page 894 and lines 1 to 13 of page 895 of the Transcript.
[74] Lines 5 to 12 of page 544 of the Transcript and Exhibit A-51.
[75] Lines 16 to 28 of page 341, page 342 and lines 1 to 10 of page 343 of the Transcript.
[76] Lines 3 to 9 of page 592, lines 9 to 23 of page 593, lines 18 to 27 of page 594, lines 9 to 25 of page 597, lines 5 to 21 of page 710, lines 22 to 28 of page 726, lines 1 to 21 of page 727 and lines 6 to 22 of page 753 of the Transcript.
[77] Lines 25 to 28 of page 1218, pages 1219 to 1228 and lines 1 to 23 of page 1229 of the Transcript.
[78] Lines 24 to 28 of page 1229, pages 1230 to 1232, lines 1 to 12 of page 1233, lines 26 to 28 of page 1245 and lines 1 to 10 of page 1246 of the Transcript and Exhibits R-31 through R-39.
[79] Line 28 of page 1251, lines 1 to 23 of page 1252, lines 8 to 28 of page 1253 and line 1 of page 1254 of the Transcript and Exhibit R-42.
[80] Lines 18 to 28 of page 1237 and lines 1 to 7 of page 1238 of the Transcript.

identified with the CHT Program by WHI were purchased by Crunin or KP Innovispharm.[81] Mr. Monahan stated:

> We took issue with a document called a sale and supply agreement between KPI and Crunin that purports to show that they did take possession. But what we found, after reviewing all the manufacturers, is that there had never been any indication, any document, any shipping document, any invoice, any money transfer, that indicated that KP Innovispharm had owned those drugs at any time.
>
> . . .
>
> But the information we received from the manufacturers showed that KP Innovispharm never acquired pharmaceuticals. There's no evidence they ever owned the pharmaceuticals. The purchases made to the manufacturers, as we concluded from reviewing the invoices and the shipping documents, was that KP Innovispharm never owned those drugs, and therefore never had the ability to transfer the title of those drugs to Crunin.[82]

[56] WHI identified KP Innovispharm as the holder of a lien on the pharmaceuticals. After the CRA obtained details of the transfers of funds from the lawyers' trust accounts, Mr. Monahan asked the CCA to request Bank of Cyprus statements for KP Innovispharm from the Cyprus Competent Authority (the "Cyprus CA"). Mr. Senecal testified that the CCA made the request and received bank statements from the Cyprus CA (the "Bank Statements").[83]

[57] Mr. Monahan testified that, according to the audit, approximately $116 million was deposited into the Cyprus bank account of KP Innovispharm in 2004 through 2006 from the trust accounts held by Mr. Sommer and Mr. Hancock. This number corresponded to the amount of the lien on the pharmaceuticals identified by WHI. However, the CRA's examination of the Bank Statements indicated that none of this money was paid by KP Innovispharm to the manufacturers of pharmaceuticals, that $70 million was transferred to a company called Hever International, which the CRA believed (based on the Bank Statements) was beneficially owned by Leonard Bellam, and that $22 million was transferred to PK Bonapharm, which was one of the companies purchasing

[81] Lines 7 to 23 of page 1236 of the Transcript.
[82] Lines 17 to 23 of page 1236, line 28 of page 1279 and lines 1 to 7 of page 1280 of the Transcript.
[83] Exhibit R-43.

pharmaceuticals and which again was believed by the CRA (based on the Bank Statements) to be beneficially owned by Leonard Bellam.[84]

[58] Counsel for Mr. Eisbrenner objected to the admission of the Invoices and the Bank Statements on the grounds that the content of these documents was hearsay. After receiving written submissions, I ruled that the Invoices and the Bank Statements were admissible into evidence as proof of the truth of their contents under the principled exception to the hearsay rule.[85]

C. The Expert Evidence

[59] Professor Berndt prepared an expert report[86] and testified as an expert valuator for the Respondent.

[60] Professor Berndt opines that the methodology for valuating pharmaceuticals adopted by the CHT Program substantially overstates the value of the pharmaceuticals:

> . . . I understand that Appellants' gift receipt amounts are based on these methodologies. In my judgment, the methodologies put forward by Messrs. Rosenberg and Marigold would lead to substantial overestimates of the fair market value for the Products. Specifically, both methodologies recommend that fair market value be estimated with a Canadian list price that, like AWP and WAC in the United States, is typically substantially greater than actual acquisition costs for generic prescription drugs in Canada.
>
> Mr. Rosenberg and Mr. Marigold recommend that fair market value for a generic drug be estimated as the listed price for that generic drug in either the Ontario provincial formulary or the catalogues of major Canadian pharmaceutical wholesalers. Mr. Rosenberg claims further that the wholesaler catalogue prices are in most cases identical to the Ontario formulary prices. Mr. Rosenberg asserts

[84] Lines 21 to 28 of page 1185, lines 1 to 5 of page 1186, lines 7 to 28 of page 1193, page 1194, lines 1 to 24 of page 1195, lines 18 to 28 of page 1204 and lines 1 to 3 of page 1205, lines 6 to 28 of page 1206, pages 1207 to 1210 and lines 1 to 24 of page 1211 of the Transcript.
[85] Lines 13 to 28 of page 1362, pages 1363 to 1374 and lines 1 to 8 of page 1375 of the Transcript.
[86] "Expert Report Concerning the Fair Market Value of Certain Generic Prescription Drugs" dated November 6, 2016 (the "Berndt Report") (Exhibit R-28).

> that the wholesaler catalogue prices represent the "actual amount paid by pharmacies for the pharmaceuticals," and Mr. Marigold asserts similarly that they represent "what the pharmacies themselves pay for the pharmaceuticals." Messrs. Rosenberg and Marigold are incorrect.
>
> . . .
>
> Rebates for generic drugs in Canada have been estimated to be at least 40 percent on average and as much as 80 percent. Hence Canadian pharmacies actually pay up to 80 percent less than wholesaler catalogue prices for generic pharmaceuticals. The wholesaler catalogue prices that Messrs. Rosenberg and Marigold recommend thus have no connection with the transactions prices actually charged and received by manufacturers for generic drugs in Canada. Therefore, in my judgment, the methodologies and recommendations of Mr. Rosenberg and Mr. Marigold provide inappropriate measures of fair market value for generic prescription drugs and substantially overstate actual transactions prices.
>
> I do not consider list prices such as AWP, WAC, provincial formulary prices, or wholesaler catalogue prices in my estimation of fair market value because they tend to overstate transactions prices for generic prescription drugs actually charged and received by manufacturers and are thus inappropriate for that purpose.[87]

[61] Professor Berndt goes on to conclude:

> Based on my research, experience, and understanding of generic prescription drug markets, as summarized above, it is my judgment that prices charged by generic manufacturers to distributors, wholesalers, and retail outlets such as pharmacies and hospitals represent an appropriate measure of fair market value for generic prescription drugs. In this section, I describe two sources of data on manufacturer prices and the methods I use to calculate average manufacturer prices for the Products from each data source.[88]

[62] The first source of data is the invoices obtained by Mr. Monahan from manufacturers. Professor Berndt acknowledged that this data was incomplete and did not address all the pharmaceuticals identified with the CHT Program. Based on his analysis of this data, Professor Berndt prepared Exhibit 5 to his expert report.

[63] The second source of data is the MIDAS database published by QuintilesIMS (formerly, IMS). With respect to the latter, Professor Berndt states in his report:

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[87] Paragraphs 30, 31, 33 and 34 of the Berndt Report.

[88] Paragraph 22 of the Berndt Report. See, also, lines 17 to 28 of page 1066 and lines 1 to 21 of page 1067 of the Transcript.

> . . . The MIDAS data are widely used by researchers to examine prices of prescription drugs across different international markets. The MIDAS data and sales and quantity data produced by IMS more generally (such as the National Prescription Audit and the National Sales Perspective) are regarded as the "gold standard" for such types of data. . . . [89]

[64] Based on the MIDAS data, Professor Berndt prepared Exhibit 4 to his expert report. He described this data as setting the ceiling to the value of the pharmaceuticals.

III. Analysis

A. The Burden of Proof regarding the Assumptions of Fact

[65] Counsel for Mr. Eisbrenner submits that since the only facts of which Mr. Eisbrenner has knowledge are those in subparagraphs 18(yy) to (ccc), (qq), and (eee) to (iii) of the Eisbrenner Reply, as a matter of procedural fairness Mr. Eisbrenner should not be required to demolish the remaining assumptions about which he has no knowledge. Rather the Minister should bear the burden of proof with respect to the majority of her factual assumptions.

[66] Mr. Morrison did not raise the burden of proof argument in his submissions. However, it is apparent from Mr. Morrison's testimony that his knowledge of the facts assumed by the Minister in the Morrison Replies is also quite limited.[90]

[67] In cross-examination, counsel for the Respondent asked Mr. Morrison if his position was that he had no access to the assumed facts about which he had no knowledge and Mr. Morrison responded that he did not know what information he may have had access to, but he could not say unqualifiedly that he had no access to any of the information.[91]

(1) The Law regarding the Assumptions of Fact and the Burden of Proof

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[89] Paragraph 35 of the Berndt Report.
[90] Lines 20 to 28 of page 146, pages 147 to 161 and lines 1 to 25 of page 162 of the Transcript.
[91] Lines 5 to 28 of page 168 and lines 1 to 2 of page 169 of the Transcript.

[68] The burden of proof in tax cases and the relationship of that burden to the assumptions of fact made by the Minister has been the subject of much commentary in the tax jurisprudence. In *House v. The Queen*, 2011 FCA 234 ("*House*"), the Federal Court of Appeal stated:

> In determining the issue before us, it is important to keep in mind the Supreme Court of Canada's decision in *Hickman Motors Ltd. v. R.*, [1997] 2 S.C.R. 336 (S.C.C.) (*Hickman*), where Madam Justice L'Heureux-Dubé enunciated, at paragraphs 92 to 95 of her Reasons, the principles which govern the burden of proof in taxation cases:
>
> > 1. The burden of proof in taxation cases is that of the balance of probabilities.
> >
> > 2. With regard to the assumptions on which the Minister relies for his assessment, the taxpayer has the initial onus to "demolish" the assumptions.
> >
> > 3. The taxpayer will have met his initial onus when he or she makes a *prima facie* case.
> >
> > 4. Once the taxpayer has established a *prima facie* case, the burden then shifts to the Minister, who must rebut the taxpayer's *prima facie* case by proving, on a balance of probabilities, his assumptions (in this case, that Hunt River held at the end of taxation year 2002 a long-term investment of $305,000, which it transferred to the appellant in 2003).
> >
> > 5. If the Minister fails to adduce satisfactory evidence, the taxpayer will succeed.[92]
>
> [Emphasis added.]

[69] In *Sarmadi v. The Queen*, 2017 FCA 131 ("*Sarmadi*"), Justice Webb reviewed the law on burden of proof and concluded:

> 61 In my view, a taxpayer should have the burden to prove, on a balance of probabilities, any facts that are alleged by that taxpayer in their notice of appeal and that are denied by the Crown. In most cases this should end the discussion of the onus of proof since the assumptions of fact made by the Minister in reassessing the taxpayer would generally be inconsistent with the facts pled by the taxpayer with respect to the material facts on which the reassessment was issued.

[92] Paragraph 30.

> 62 If there are facts that were assumed by the Minister in reassessing a taxpayer and that are not inconsistent with the facts as pled by that taxpayer, it would also seem logical to require the taxpayer to prove, on a balance of probabilities, that these facts assumed by the Minister (and which are in dispute and are not exclusively or peculiarly within the Minister's knowledge) are not correct. Requiring a taxpayer to disprove the facts assumed by the Minister in reassessing that taxpayer simply puts the onus on the person who knows (or ought to know) the facts. It also puts the onus on the person who indirectly asserted certain facts in filing their tax return that would be inconsistent with the facts assumed by the Minister in reassessing such taxpayer.
>
> 63 Once all of the evidence is presented, the Tax Court judge should then (and only then) determine whether the taxpayer has satisfied this burden. If the taxpayer has, on the balance of probabilities, disproven the particular facts assumed by the Minister, based on all of the evidence, there is no burden to shift to the Minister to disprove what the Tax Court judge has determined that the taxpayer has proven. Either the taxpayer has disproven the assumed facts or he, she or it has not.

[70] Justice **Stratas**, writing for the majority, declined to provide a definitive opinion on the burden of proof issue but did provide the following helpful comments:

> 69 I have read Justice Webb's reasons on the issue of the burden of proof in tax appeals. I commend him on his exploration of this issue.
>
> 70 The issue has been considered before in this Court. My colleague's reasons somewhat revisit this issue and articulate it somewhat differently. I find much of what my colleague says to be thoughtful, illuminating and attractive.
>
> 71 However, at this time and in these circumstances, I decline to express a definitive opinion on the correctness of his views on this fundamental point. The insights of commentators may be helpful. Judges in the Tax Court may also have useful insights. As well, in a future appeal in this Court where the issue matters, other counsel may also be able to assist.

[71] While I am bound by the decision of the Federal Court of Appeal in *House* and will base my decision on the principles stated in that decision and others on point, in light of the comments in *Sarmadi*, I will first provide my analysis of the issue of burden of proof in tax cases as suggested by Justice **Stratas**. I believe this approach is consistent with the instruction of the Supreme Court of Canada in *The Queen v. Craig*, 2012 SCC 43, where Rothstein J. stated:

> But regardless of the explanation, what the court in this case ought to have done was to have written reasons as to why *Moldowan* was problematic, in the way that the reasons in *Gunn* did, rather than purporting to overrule it.[93]

(2) Analysis of the Law regarding the Burden of Proof in Tax Cases

[72] I will start by observing that there are only two burdens recognized by Canadian law: the burden of proof (which I will refer to as the "persuasive burden") and the evidential burden. In *The Queen v. Fontaine*, 2004 SCC 27 ("*Fontaine*"), a unanimous nine judge panel of the Court summarily describes these two burdens at paragraphs 10 to 12:

> We are concerned with the evidential burden on a defence of mental disorder automatism and not with the "persuasive" burden [i.e., the burden of proof] on that defence.
>
> An "evidential burden" is not a burden of proof. It determines whether an issue should be left to the trier of fact, while the "persuasive burden" determines how the issue should be decided.
>
> These are fundamentally different questions. The first is a matter of law; the second, a question of fact. . . . [Emphasis added by Court]

[73] A party with an evidential burden has the responsibility to ensure there is sufficient evidence of the existence or non-existence of a particular fact or issue to pass the threshold test for that particular fact or issue but is not required to actually prove anything.[94] Whether an evidential burden is met is a question of law determined by the trial judge.[95] Common examples of when an evidential burden must be met are by the plaintiff on a motion by the defendant for non-suit, by the

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[93] Paragraph 21.

[94] In *R. v. Schwartz*, [1988] 2 S.C.R. 443 at 466 to 467, Dickson C.J. explained, in a dissenting judgment, the important difference between the persuasive burden and the evidential burden:

> The party who has the persuasive burden is required to persuade the trier of fact, to convince the trier of fact that a certain set of facts existed. Failure to persuade means that the party loses. The party with an evidential burden is not required to convince the trier of fact of anything, only to point out evidence which suggests that certain facts existed. The phrase "onus of proof" should be restricted to the persuasive burden, since an issue can be put into play without being proven.

[95] See *R. v. Cinous*, 2002 SCC 29 at paragraph 91 and *R. v. Arcuri*, 2001 SCC 54 at paragraph 24 where the Supreme Court reproduced the following statement (at paragraphs 91 and 24, respectively) from the 19th century decision of the House of Lords in *Metropolitan Railway Co. v. Jackson* (1877), 3 App. Cas. 193 which addressed a claim of negligence:

> The judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred.

Crown in a motion by the accused for a directed verdict and by the accused in order to place certain positive defences before the trier of fact.

[74] A party with a persuasive burden must prove the facts material to the issue(s) in question to the civil or criminal standard of proof. The civil standard of proof is always on a balance of probabilities: *H. (F.) v. McDougall*, 2008 SCC 53 ("*McDougall*") and *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 ("*Merck Frosst*") at paragraph 94.

[75] As stated by Justice Webb in *Sarmadi*,[96] whether a persuasive burden is met is determined by the trier of fact at the conclusion of the case (i.e., after the evidence of both parties has been placed into the record). In *Robins v. National Trust Co.*, [1927] A.C. 515 ("*Robins*"), the Privy Council describes the role of the persuasive burden as follows:

> But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.[97]

[76] The substantive law determines which, if any, of the two burdens is assigned to a party. Typically, the party with the persuasive burden for a fact or issue also has the evidential burden for that fact or issue. In civil actions, the plaintiff typically bears the persuasive burden because the plaintiff is seeking to change the status quo.[98]

[77] Importantly, once a persuasive burden or evidential burden is assigned to a party that burden does not "shift" to the other party. The authors of SLB state this point as follows:

> The authorities and the jurisprudence often refer to the shifting of the evidential burden or the persuasive (legal) burden of proof. Except for the operation of

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[96] Paragraph 63.

[97] The authors of Sopinka, Lederman, Bryant, *The Law of Evidence in Canada* (5th ed., 2018) ("SLB") describe the process as follows at paragraph 5.60:

> The persuasive (legal) burden of proof comes into force when the trial judge directs the jury (or himself or herself, as the case may be) at the conclusion of the case as to which party bears the burden to prove a fact or issue. The trial judge also directs the jury on the degree of satisfaction that is necessary to find in the proponent's favour. If the proponent has not satisfied the trier of fact to the appropriate degree, the proponent will lose on that issue.

[98] SLB at paragraph 5.62.

> presumptions of law or rebuttable statutory provisions, these burdens do not shift.[99]

[78] A presumption or statutory rule may provide that the discharge of a burden by one party gives rise to a separate burden on the other party. While such a rule is often colloquially described as shifting the burden, in fact there are two separate burdens that must be satisfied. The presumption or statutory rule determines the burden that must be satisfied by each party (i.e., a persuasive burden or an evidential burden).

[79] The decisions of the Supreme Court of Canada in *Anderson Logging Co. v. The King*, [1925] S.C.R. 45, affirmed [1926] A.C. 140 (PC) ("*Anderson Logging*") and *Johnston v. M.N.R.*, [1948] S.C.R. 486 ("*Johnston*") settled long ago who bears the persuasive burden in civil (as opposed to criminal) tax appeals addressing the correctness of an assessment of tax.[100]

[80] In *Anderson Logging*, the Court stated at paragraph 9:

> He [the taxpayer] must shew that the impeached assessment is an assessment which ought not to have been made; that is to say, he must establish facts upon which it can be affirmatively asserted that the assessment was not authorized by the taxing statute, or which bring the matter into such a state of doubt that, on the principles alluded to, the liability of the appellant must be negatived.

[81] In *Johnston*, Rand J. for the majority and Kellock J. in a concurring judgment each confirmed in different terms that in an appeal addressing the correctness of an assessment of income tax the taxpayer has the persuasive burden.

[82] Rand J. states:

> 7. Notwithstanding that it is spoken of in section 63(2) as an action ready for trial or hearing, the proceeding is an appeal from the taxation; **and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged. Every such fact found or assumed by the assessor or the Minister must then be accepted as it was**

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[99] SLB at paragraph 3.46. See, also, *Phipson on Evidence* (18th ed., 2013) at page 162 and J. Kenneth McEwan, *Sopinka on the Trial of an Action* (3rd ed., 2016) at paragraph 4.3.

[100] The Minister has the persuasive burden regarding penalties and assessments issued outside the statutory limitation period: subsection 163(3) of the ITA and *M.N.R .v. Taylor*, 61 D.T.C. 1139 (Ex. Ct.), respectively. As well, there are preliminary issues for which a specific persuasive burden is placed on the Minister. For example, if the taxpayer asserts that the Minister did not assess the taxpayer or did not send the notice of assessment to the taxpayer, the persuasive burden to prove otherwise falls on the Minister (*Aztec Industries Inc. v. The Queen*, 179 N.R. 383 (FCA) at paragraph 12).

dealt with by these persons unless questioned by the appellant. If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules mentioned he should have raised that issue in his pleading, **and the burden would have rested on him as on any appellant to show that the conclusion below was not warranted**. For that purpose he might bring evidence before the Court notwithstanding that it had not been placed before the assessor or the Minister, **but the onus was his to demolish the basic fact on which the taxation rested**.

. . .

9. I am consequently unable to accede to the view that the proceeding takes on a basic change where pleadings are directed. The allegations necessary to the appeal depend upon the construction of the statute and its application to the facts and the pleadings are to facilitate the determination of the issues. **It must, of course, be assumed that the Crown, as is its duty, has fully disclosed to the taxpayer the precise findings of fact and rulings of law which have given rise to the controversy**. But unless the Crown is to be placed in the position of a plaintiff or appellant, I cannot see how pleadings shift the burden from what it would be without them. **Since the taxpayer in this case must establish something, it seems to me that that something is the existence of facts or law showing an error in relation to the taxation imposed on him**.

[Emphasis and double emphasis added.]

[83] Kellock J. stated:

14 The learned trial judge held that the onus was upon the appellant to establish the facts in support of this contention and that he had failed to do so.

. . .

19 As I read the provisions of the statute commencing with section 58, a person who objects to an assessment is obliged to place before the Minister on his appeal the evidence and the reasons which support his objection. **It is for him to substantiate the objection.** If he does not do so he would, in my opinion, fail in his appeal. That is not to say, of course that if he places before the Minister facts which entitle him to succeed, the Minister may arbitrarily dismiss the appeal. No question of that sort arises here, and I am deciding nothing with respect to it.

20 I further think that that situation persists right down to the time when the matter is in the Exchequer Court under the provisions of section 63. I **regard the pleadings**, which may be directed to be filed under subsection 2 of that section, **as merely defining the issues which arise on the documents required to be filed in the court without changing the onus existing before any such order is made.** In my opinion therefore **the learned judge below was right in his view that the onus lay upon the appellant**.

[Emphasis added.]

[84] In addition to allocating the persuasive burden to the taxpayer, *Johnston* is frequently cited as authority for the proposition that there is a burden on the taxpayer to "demolish" the Minister's assumptions of fact. This "burden" is not a distinct persuasive burden on the taxpayer. Rather, it is a unique aspect of the persuasive burden placed on the taxpayer by *Johnston*. As the following analysis will demonstrate, the Minister must identify the factual basis of the assessment and to meet the persuasive burden the taxpayer must ensure there is evidence on the record that establishes on a balance of probabilities that the assumed facts are not correct or do not exist.[101]

[85] Rand J. observes that an assessment of tax is based on certain facts and certain provisions of law and holds that the facts on which the assessment is based must be accepted as true unless challenged by the taxpayer. Rand J. places the burden on the taxpayer "to demolish the basic fact on which the taxation rested".

[86] While the word "demolish" is not typically used to describe a standard of proof associated with a persuasive burden, it is apparent from the import of the word—and the fact that an evidential burden does not require proof of anything—that Rand J. is describing the persuasive burden on the taxpayer, which must be met on the balance of probabilities. Rand J. observes that the persuasive burden of the taxpayer is aimed at the fact(s) on which the assessment of tax is based.

[87] This interpretation is reinforced when Rand J. later states that the taxpayer "**must establish** . . . the existence of facts . . . showing an error in relation to the taxation imposed on him".

[88] Importantly, neither Rand J. nor Kellock J. says anything about a persuasive burden on the Minister, or the shifting of the persuasive burden to the Minister. This is explained by the fact that only one party can bear the persuasive burden in respect of an issue such as the correctness of an assessment and by the legal principle that once allocated to a party by the substantive law, absent a presumption or statutory rule, the persuasive burden remains with that party.

[89] Rand J. recognizes that the facts on which the assessment is based may be in the form of assumptions of fact pleaded by the Minister or they may be in the form

[101] The taxpayer may also challenge whether the assumptions of fact pleaded by the Minister are valid assumptions and whether the assessment is correct even if the assumptions of fact are true. The first option is discussed in more detail later in these reasons.

of facts found and pleaded by the Minister. Today, there is only one category of facts that are initially accepted as true: the assumptions of fact stated in the Reply that were made by the Minister when issuing or confirming the assessment of the taxpayer.[102]

[90] Rand J. states that "[i]t must, of course, be assumed that the Crown, as is its duty, has fully disclosed to the taxpayer the precise findings of fact and rulings of law which have given rise to the controversy". Today, it is accepted that for assumed facts to be recognized as being in support of the assessment and therefore as being true, the Minister is required to plead those assumed facts completely and accurately.[103] This is a matter of fairness to the taxpayer, who has the persuasive burden to disprove the correctness or existence of the facts that are the basis of the assessment.

[91] In *House,* the Federal Court of Appeal cites the decision of L'Heureux-Dubé J. in *Hickman Motors Limited v. The Queen*, [1997] 2 S.C.R. 336 ("*Hickman Motors*") for the proposition that the taxpayer need only present a *prima facie* case to demolish the Minister's assumptions of fact and shift the persuasive burden to the Minister.

[92] In *Hickman Motors*, there were three judgments of the Court. Three of the four judges in the majority agreed with the general approach taken by L'Heureux-Dubé J. and with the result but decided the appeal on narrower grounds. Writing for these three judges, McLachlin J. (as she then was) stated:

> 1 While I concur in the general approach and the conclusion of Justice L'Heureux-Dubé, I prefer to decide the appeal on somewhat narrower grounds.
>
> 2 In order to deduct the capital cost allowance at issue, (1) Hickman Motors Ltd. must have had a business source of income to which the assets related (s. 20(1) of the *Income Tax Act*, S.C. 1970-71-72, c. 63); and (2) the assets must have been acquired for the purpose of producing income (*Income Tax Regulations*, C.R.C., c. 945, Regulation 1102(1)(*c*)).
>
> 3 On the first question, I agree with L'Heureux-Dubé J. that the evidence establishes that Hickman Motors Ltd. carried on the business of leasing

[102] *The Queen v. Anchor Pointe Energy Ltd.*, 2003 FCA 294 at paragraphs 29 to 41 and *The Queen v. Anchor Pointe Energy Ltd.*, 2007 FCA 188 ("*Anchor Pointe 2007*") at paragraph 28.

[103] *Anchor Pointe 2007* at paragraph 29. Paragraph 49(1)(d) of the *Tax Court of Canada Rules (General Procedure)* (the "General Rules") requires every reply to include "the findings or assumptions of fact made by the Minister when making the assessment".

> equipment and hence possessed a business source of income related to the assets for which capital cost allowance was claimed. This established, it is unnecessary to enter on the "sub-source" issue.
>
> 4 The second question is whether the assets for which the capital cost allowance was claimed were acquired for the purpose of producing income, so as to avoid the exclusion established by Regulation 1102(1). . . .
>
> . . .
>
> 6 So long as Hickman Motors Ltd. did not commence to use the property for some purpose other than the production of income (s. 13(7)(*a*)), the property remains eligible for a capital cost allowance deduction. **There is no evidence that this occurred**.
>
> 7 . . . Here the assets served only one function, to produce income. That Hickman Motors may have intended to retransfer the assets to Hickman Equipment (1985) Ltd. is of no moment. **The evidence admits of only one conclusion: that the assets were business assets associated with the production of income**.
>
> [Emphasis and double emphasis added.]

[93] The judgment of McLachlin J. states that based on the evidence there was only one reasonable view of the facts. This strongly suggests that the persuasive burden was not a deciding factor in the decision of 3 of the 4 judges in the majority.[104] In light of this, I respectfully suggest that L'Heureux Dubé J.'s comments on onus were *obiter dicta*.

[94] L'Heureux Dubé J. states at paragraphs 92, 93 and 94:

> It is trite law that in taxation the standard of proof is the civil balance of probabilities . . . and that within balance of probabilities, **there can be varying degrees of proof required in order to discharge the onus, depending on the subject matter** . . . . The Minister, in making assessments, proceeds on assumptions . . . and the initial onus is on the taxpayer to "demolish" the Minister's assumptions in the assessment . . . . The initial burden is only to "demolish" the exact assumptions made by the Minister but no more . . . .
>
> This initial onus of "demolishing" the Minister's exact assumptions is met where the appellant makes out at least a *prima facie* case . . . .
>
> Where the Minister's assumptions have been "demolished" by the appellant, "the onus . . . shifts to the Minister to rebut the *prima facie* case" made out by the

[104] See quote from *Robins*, *supra*.

> appellant and to prove the assumptions: . . . . Hence, in the case at bar, the onus has shifted to the Minister to prove its assumptions that there are "two businesses" and "no income".
>
> [Emphasis added.]

[95] L'Heureux Dubé J. restates the principle from *Johnston* that the taxpayer is only required to demolish the precise assumptions of fact made by the Minister. L'Heureux-Dubé J. also acknowledges that the persuasive burden on the taxpayer must be met on a balance of probabilities. L'Heureux-Dubé J. goes on to state that this burden may be discharged by presenting a *prima facie* case and that the discharge of taxpayer's burden results in a persuasive burden on the Minister. L'Heureux-Dubé J.'s remarks regarding a *prima facie* case being sufficient to demolish the assumptions of fact appear to be predicated on her view that "within balance of probabilities, there can be varying degrees of proof required in order to discharge the onus".

[96] With respect, the subsequent decisions of the Supreme Court of Canada in *McDougall* and *Merck Frosst* have made clear that there is only one civil standard of proof—on the balance of probabilities—and that while the evidence required to meet this standard is dependent on all the circumstances, the standard itself does not vary.[105] Moreover, the term "*prima facie* case" is typically used to describe an evidential burden and not a persuasive burden. Paciocco and Stuesser, the authors of *The Law of Evidence* (7th ed., 2015) describe the *prima facie* case standard as follows:

> The *prima facie* case standard is an important example of an "evidential burden." It is used as a screening process to see whether it is justifiable and sensible to have a case go to the trier of fact who is designated by law to give an ultimate factual decision on the matter. . . . [106]

[97] *Anderson Logging* and *Johnston* assign the persuasive burden relating to the correctness of the assessment to the taxpayer. With respect, this persuasive burden cannot be "shifted" to the Minister and there is no presumption or statutory rule that upon the taxpayer's satisfaction of the persuasive burden places a separate evidential burden or persuasive burden on the Minister.

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[105] In *Merck Frosst*, the Supreme Court states at paragraph 94:

> It is now settled law that there is only one civil standard of proof at common law and that standard is proof on the balance of probabilities . . . [W]hat evidence will be required to reach that standard will be affected by the nature of the proposition the third party seeks to establish and the particular context of the case.

[106] At page 589.

[98] The placement of the persuasive burden on the taxpayer means that in argument the taxpayer must be able to point to evidence on the record that establishes on the balance of probabilities that the facts on which the assessment is based are either wrong or do not exist.

[99] The evidence relied upon by the taxpayer may be introduced through the examination, cross-examination or re-examination of witnesses of either party, through the production of documents by either party or through any other means permitted by the Court[107] or the General Rules.[108]

[100] The parties may agree to facts by admissions in the pleadings or by admissions in a statement of agreed facts.[109] Any fact stated in the notice of appeal that is not denied in the reply is deemed to be admitted unless the reply states that the respondent has no knowledge of the fact.[110]

[101] In many tax appeals, the facts assumed by the Minister and stated in the reply are the only facts supporting the assessment of the taxpayer.[111] While the Minister may choose to lead evidence in support of the assumptions of fact even though they are treated as true, this is a purely tactical decision made by the Minister.

[102] If the Minister does not state an assumption of fact in the reply then that fact has no bearing on the outcome of the appeal unless the fact is established by the evidence on the record at the end of the hearing. In *Pollock v. The Queen*, 161 N.R. 232 (FCA) ("*Pollock*"), the Federal Court of Appeal states this point as follows:

> Where, however, the Minister has pleaded no assumptions, or where some or all of the pleaded assumptions have been successfully rebutted, it remains open to the Minister, as defendant, to establish the correctness of his assessment if he can. In undertaking this task, **the Minister bears the ordinary burden <u>of any party</u> to a**

[107] See sections 143 to 146 of the General Rules.
[108] Section 100(1) of the General Rules allows a party to read-in evidence given on the examination for discovery of the other party if the evidence is otherwise admissible. Sections 129 to 132 allows one party to request that the other party admit the truth of facts or the authenticity of documents and the admissions can be entered into the record at the hearing.
[109] Subject to the comments of Noel J.A. (as he then was) in *Hammill v. The Queen*, 2005 FCA 252 at paragraphs 28 to 32. In that case, the concession by the Minister that the taxpayer was engaged in an adventure in the nature of trade was a conclusion of mixed law and fact.
[110] Subsection 49(2) of the General Rules.
[111] This is particularly true of appeals heard under the Court's informal procedure.

> **lawsuit**, namely to prove the facts which support his position **unless those facts have already been put in evidence by his opponent**. . . .[112]
>
> [Emphasis added.]

[103] The "ordinary" burden on the Minister identified by the Court in *Pollock* is neither an evidentiary burden nor a persuasive burden; it is a tactical burden.[113] The Supreme Court of Canada explains the nature of a tactical burden in *R. v. Darrach*, 2000 SCC 46 ("*Darrach*") as follows:

> There is an important difference between a burden of proof with regard to an offence or an evidentiary burden, and the tactical need to respond when the Crown establishes a *prima facie* case, in order to raise a reasonable doubt about it. '[T]he criminal law does not allocate an evidential burden to the accused to refute the Crown's case and he or she may decline to adduce any evidence. Nevertheless, if the accused decides not to call any evidence, he or she runs the risk of being convicted' . . . . Where there is neither a legal obligation nor an evidentiary burden on the accused, the mere tactical pressure on the accused to participate in the trial does not offend the principle against self-incrimination (s. 11(c)) or the right to a fair trial (s. 11(d)).[114]

[104] The taxpayer may challenge whether the Minister did in fact assume the facts that are pleaded as such in the reply at or prior to the time the assessment was issued or confirmed. In *The Queen v. Loewen*, 2004 FCA 146, the Federal Court of Appeal observed:

> The Minister's factual assumptions, as stated in the Crown's pleadings, are taken as fact unless they are disproved **or** it is established that the Minister did not make the assumptions that are said to have been made. **The taxpayer has the onus of proving that the Minister's assumptions** are not true **or that they were not made**. . . .[115]
>
> [Emphasis and double emphasis added.]

[105] If the taxpayer proves on a balance of probabilities that the assumptions of fact stated in the reply were not made, or that these assumptions of fact were made after the assessment was issued or confirmed, the impugned facts are removed from the Court's consideration at the end of the hearing unless—as with missing

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[112] Page 237, paragraph 20.
[113] This is confirmed by the Court's observation that an ordinary burden may be borne by any party to a lawsuit – an evidential burden or persuasive burden is assigned to one party or the other by the substantive law.
[114] At paragraph 50. See, also, SLB at paragraph 3.52.
[115] Paragraph 8, citing *Johnston* and *M.N.R. v. Pillsbury Holdings Ltd.*, [1965] 1 Ex. C.R. 676.

assumptions of fact—there is evidence on the record addressing those facts.[116] If such evidence is not on the record at the end of the taxpayer's case,[117] as a practical matter, the Minister would need to lead the evidence as part of the Minister's case (i.e., the Minister would have a tactical burden).

[106] In addition to assumptions of fact, the Minister must plead any other material facts relevant to the assessment.[118] However, if the Minister wishes to rely on material facts stated in the reply, in argument the Minister must be able to point to evidence on the record in support of those facts. If the evidence is not on the record at the end of the taxpayer's case, as a practical matter, the Minister would need to lead the evidence as part of the Minister's case (i.e., the Minister would have a tactical burden).

[107] For appeals under the general procedure, the taxpayer is required to plead the material facts in support of the appeal of the assessment.[119] This is required to define the issues in dispute between the parties for the purposes of production, discovery and trial.[120]

[108] For appeals under the Court's informal procedure, there is no strict requirement for taxpayers to plead material facts.[121] In practice, it is quite common for taxpayers appealing under the informal procedure to state few if any facts in the notice of appeal and at the hearing of the appeal to simply direct their evidence to the assumptions of fact stated in the reply.

[109] The foregoing principles were succinctly summarized by the Federal Court of Appeal in *Anchor Pointe 2007* as follows:

> 27 In our self-reporting system of taxation, the Minister makes assumptions of fact in determining the tax liability of a taxpayer. As Rothstein J.A., as he then was, said in *Anchor Pointe Energy Ltd. v. R.*, *supra*, "the practice is for the Crown to disclose in its pleadings assumptions of fact made by the Minister upon which his determination of the tax owing is based"; see paragraph 2. In the words of Bowman A.C.J.T.C., as he then was, these assumptions "are supposed to be a full and honest disclosure of the facts upon which the Minister of National Revenue

[116] Evidence addressing such facts is material since the facts are stated in the reply even though not treated as assumptions of fact.
[117] This includes evidence obtained through the respondent's cross-examination of the taxpayer's witnesses.
[118] Paragraph 49(1)(e) of the General Rules.
[119] Section 48 and Form 21(1)(a) of the General Rules.
[120] *Beima v. The Queen*, 2016 FCA 205 at paragraph 17.
[121] Section 4 of the *Tax Court of Canada Rules (Informal Procedure)*. The use of the form in Schedule 4 to these rules is optional.

> relied in making the assessment": *Holm v. R.* (2002), 2003 D.T.C. 755 (T.C.C. [General Procedure]), at paragraph 9.
>
> 28 When pleaded, assumptions of fact **place on the taxpayers** the initial onus of disproving, **on a balance of probabilities**, the facts that the Minister assumed: see *Anchor Pointe Energy Ltd. v. R.*, *supra*, at paragraph 2, *Hickman Motors Ltd. v. R.*, [1997] 2 S.C.R. 336 (S.C.C.), at paragraph 92. **Unpleaded assumptions have no effect on the burden of proof one way or the other**: see *Bowens v. R.* (1996), 96 D.T.C. 6128 (Fed. C.A.), at page 6129, *Pollock v. R.* (1993), 94 D.T.C. 6050 (Fed. C.A.), at page 6053.
>
> 29 Fairness requires that the facts pleaded as assumptions be complete, precise, accurate and honestly and truthfully stated **so that the taxpayer knows exactly the case and the burden that he or she has to meet**: *Anchor Pointe Energy Ltd. v. R.*, *supra*, at paragraph 23, *Holm v. R.*, *supra*, *Loewen v. R.*, [2004] 4 F.C.R. 3 (F.C.A.), at paragraph 9., *Grant v. R.*, 2003 D.T.C. 5160 (Fed. C.A.), at page 5163, *First Fund Genesis Corp. v. R.* (1990), 90 D.T.C. 6337.
>
> [Emphasis added.]

[110] The Federal Court of Appeal describes the persuasive burden on the taxpayer as the initial onus of disproving, on a balance of probabilities, the facts that the Minister assumed. The word "initial" recognizes that the taxpayer goes first in tax appeals in which the taxpayer has the persuasive burden.[122] If the taxpayer presents a strong case that on its face meets the persuasive burden,[123] the Minister is faced with the tactical decision whether to lead evidence as part of the Minister's case (i.e., lead evidence that is in addition to the evidence already on the record at the conclusion of the taxpayer's case, which would include evidence obtained through cross-examination of the taxpayer's witnesses). The burden on the Minister to tender evidence in this circumstance is a tactical burden only; the persuasive burden in respect of the correctness of the assessment of tax remains with the taxpayer.

(3) Analysis of the Appellants' Burden of Proof

[122] Subsection 135(2) of the General Rules. In a penalty-only case in which the Minister has the persuasive burden, the Minister would go first.

[123] Of course, whether the taxpayer has met the persuasive burden can only be known once all the evidence is considered at the end of the case. Hence, any assessment by the Minister of the taxpayer's case at the point in time that the taxpayer closes his/her/its case is speculative.

[111] In *Hickman Motors*, L'Heureux Dubé J. reiterated the principle in *Johnston* that the taxpayer need only demolish the exact assumptions of fact made by the Minister. The issue in this case is whether the Appellants are required to demolish the assumptions of fact in the replies about which they say they have no knowledge.

[112] Consistent with *Pollock*, where assumptions of fact are pleaded but are not treated as true, the Minister bears the ordinary (tactical) burden of any party to a lawsuit, namely to prove the facts which support her position unless those facts have already been put in evidence by the taxpayer. I do not read the decision in *House* to suggest otherwise as *House* only addresses assumptions of fact that are treated as true.

[113] The question in these appeals is whether any of the Minister's assumptions of fact should be "downgraded" to material facts that must be established by evidence on the record. In *Transocean Offshore Ltd. v. The Queen*, 2005 FCA 104 ("*Transocean*"), the Court stated:

> 34 The Judge in *Redash Trading Inc.* also said this about the factual assumptions that were not within the knowledge of the appellant (at paragraph 31):
>
> > [. . .] Perceptions of fact based upon facts which lie within the peculiar knowledge of the Respondent [the Crown] which are paraded as assumptions in the Reply to the Notice of Appeal, which are beyond the knowledge of the Appellant [Redash] and which are not easily or practicably deniable by the Appellant without extraordinary effort and expenditure, should not be deemed to be facts simply because they are not specifically negated by the Appellant's evidence. Assumptions of fact in such circumstances cannot displace the need of the Respondent to produce evidence to substantiate or support that which may be relevant to counter or affect the Appellant's factual presentation.
>
> 35 This statement recognizes the general principle that, in a tax appeal, the Crown's factual assumptions are taken as true unless they are rebutted (see *Pollock*, cited above). It also recognizes that this general principle, like all general principles, may have exceptions. **The justification for the general principle is that the taxpayer knows or has the means of knowing all of the facts relevant to an income tax assessment.** A trier of fact is entitled to draw an inference adverse to a party who has or may reasonably be presumed to have some evidence that is relevant to disputed facts, but fails to adduce that evidence. **However, there may be situations where fairness would require that no onus be placed on a taxpayer to rebut a specific factual assumption made by the Crown**. **One**

> **example might be a fact that is solely within the knowledge of the Crown**. However, I do not see this as such a case.
>
> [Emphasis added.]

[114] In *Anchor Pointe 2007*, the Court made a similar observation:

> 35 It is trite law that, barring exceptions, the initial onus of proof with respect to assumptions of fact made by the Minister in assessing a taxpayer's tax liability and quantum rests with the taxpayer. In *Voitures Orly Inc. / Orly Automobiles Inc. v. R.*, 2005 FCA 425, 2006 G.T.C. 1115 (Eng.) (F.C.A.), at paragraph 20, this Court reasserted the importance of the rule in the following terms:
>
> > To sum up, we see no merit in the submissions of the appellant that it no longer had the burden of disproving the assumptions made by the Minister. We want to firmly and strongly reassert the principle that the burden of proof put on the taxpayer is not to be lightly, capriciously or casually shifted. There is a very simple and pragmatic reason going back to over 80 years ago as to why the burden is on the taxpayer: see *Anderson Logging Co. v. British Columbia*, (1925) S.C.R. 45, *Pollock v. Canada (Minister of National Revenue)* (1993), 161 N.R. 232 (F.C.A.), *Vacation Villas of Collingwood Inc. v. Canada* (1996) 133 D.L.R. (4th) 374 (F.C.A.), *Anchor Pointe Energy Ltd. v. Canada*, 2003 FCA 294. It is the taxpayer's business. He knows how and why it is run in a particular fashion rather than in some other ways. He knows and possesses information that the Minister does not. He has information within his reach and under his control. The taxation system is a self-reporting system. Any shifting of the taxpayer's burden to provide and to report information that he knows or controls can compromise the integrity, enforceability and, therefore, the credibility of the system. That being said, we recognize that there are instances where the shifting of the burden may be warranted. This is simply not one of those cases.
>
> 36 I agree with Bowman A.C.J.T.C., as he then was, that **there may be instances where the pleaded assumptions of facts are exclusively or peculiarly within the Minister's knowledge** and that the rule as to the onus of proof may work so unfairly as to require a corrective measure: see *Holm v. R.*, *supra* at paragraph 20.
>
> [Emphasis added.]

[115] The Federal Court of Appeal makes two important points in these decisions. First, the issue of whether assumptions of fact should be taken as true is one of fairness to the taxpayer. Second, assumptions regarding facts that are exclusively

or peculiarly within the knowledge of the Minister may not be treated as true. The "may" in the second point simply recognizes that in determining whether or not to treat the assumptions of fact as true, the Court must consider whether an affirmative decision would be unfair to the taxpayer in the circumstances. If there is no unfairness to the taxpayer the assumption may stand as true even if exclusively or peculiarly within the knowledge of the Minister. The outcome in any given situation will depend on all the relevant circumstances.

[116] The word "exclusively" is clear in its meaning: the Minister is the only person that has the information. I assume the word "peculiarly" is similarly being used in the sense of belonging to or pertaining to the Minister, or in the sense of being unique to the Minister.

[117] I have considerable difficulty understanding how facts obtained by the Minister through the audit of the Appellants and the Programs in which they participated are exclusive or peculiar to the Minister.[124] Save for the audit, the facts are outside the purview of the Minister's knowledge and are clearly known by others involved in the Programs even if not known by the Appellants.

[118] The Appellants consciously chose to participate in the Programs with little or no knowledge of what went on behind the curtain, so to speak. In such circumstances, it is not unfair to the Appellants to allow the Minister to assume what went on behind the curtain.

[119] I recognize that in *Redash Trading Inc. v. The Queen*, 2004 TCC 446 at paragraph 31, (quoted from in *Transocean*), the Court identified assumptions of fact "which are not easily or practicably deniable by the Appellant without extraordinary effort and expenditure". In this case, the Appellants made no inquiries regarding what took place behind the curtain. If the Appellants had made inquiries and were stonewalled or received unsatisfactory answers, they had the clear option of not participating in the Programs. By participating in the Programs without further inquiry, the Appellants accepted the risk that the facts behind the curtain were not what they expected them to be.

[120] I therefore conclude that the Minister's assumptions of fact as stated in the Eisbrenner Reply and the Morrison Replies are to be taken as true (except to the

[124] The evidence of Mr. Monahan is that the Minister made assumptions of fact based in part on information provided by counsel for WHI. When it turned out some of this information did not accord with the information subsequently obtained by the Minister independently, the Minister abandoned the assumptions of fact and pleaded the new facts as material facts.

extent expressly recanted by the Respondent) and that in accordance with the principles stated in *House*, the taxpayer must present at least a *prima facie* case to demolish those assumptions of fact. If the Appellants do present a *prima facie* case that demolishes the Minister's assumptions of fact, then the onus shifts to the Minister to establish those facts.

B. The CGI Program

[121] As stated at the outset, only Mr. Morrison participated in the CGI Program. The Respondent describes the issue with respect to Mr. Morrison's appeal of the reassessment issued for his 2003 taxation year (the "2003 Reassessment") as follows:

> The sole issue with respect to Mr. Morrison's gift in the CGI program in 2003 is the fair market value of the pharmaceuticals that he donated. The Minister assessed the appellant on the basis that the pharmaceuticals had a FMV of $1,759 pursuant to the International Drug Price Indicator Guide as opposed to the $56,502 claimed by the appellant.[125]

[122] This position is reflected in the assumptions of fact made by the Minister in support of the 2003 Reassessment as stated in paragraph 14 of the Second Amended Reply to Mr. Morrison's Notice of Appeal for his 2003 taxation year (the "Morrison 2003 Reply"):

> (bb) in 2003, the Appellant entered into an Agreement with the Promoter whereby the Appellant purchased Pharmaceuticals from the Promoter and donated them to EBF;
>
> (cc) the purchase price of the Appellant's Pharmaceuticals from the Promoter was $10,000, an amount subject to a discount of $500 for a total cash outlay of $9,500;
>
> (dd) in 2003, the Pharmaceuticals purchased by the Appellant were gifted to EBF;
>
> …
>
> (hh) the fair market value of the Pharmaceuticals at the time they were gifted by the Appellant in 2003 did not exceed $1,759.80 as set out in the 2003 International Drug Price Indicator Guide.

[123] Mr. Wilson was questioned about the basis of the reassessment of Mr. Morrison's 2003 taxation year:

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[125] Paragraph 87 of the Respondent's Written Submissions.

> Q. Did the CRA challenge that the participants actually purchased the pharmaceuticals?
>
> A. We did not challenge that.
>
> Q. As part of their participation, the donors would sign a deed of gift gifting pharmaceuticals to certain charities. You're familiar with that?
>
> A. That is correct.
>
> Q. Did CRA challenge that the participants gifted the pharmaceuticals to charities?
>
> A. We did not. We did not challenge that.
>
> Q. Did CRA challenge any aspect of the gifts associated with the CGI program?
>
> A. We did. We challenged the valuation of the gifts.[126]

[124] Mr. Morrison submitted that the amount of the gift should be as stated in the tax receipt he received for his donation to EBF (i.e., $56,502.80), or at a minimum the $9,500 of cash he paid for the pharmaceuticals. With respect to the latter point, Mr. Morrison submitted that the cash amount was more than 20% of the receipt amount of $56,502.80 less the cash amount (i.e., $47,002.80) and therefore subsection 248(30) of the ITA applied.[127]

[125] Professor Berndt opined that the valuations of the pharmaceuticals provided by the CHT Program were flawed for several reasons including significantly the failure to use a comparable uncontrolled price from an appropriate market to value the generic drugs.

[126] Based on the testimony of Mr. Zive,[128] the approach to valuation taken by Pharmaspec for the CGI Program was the same as the approach to valuation taken by Mr. Rosenberg in the CHT Program. In both cases, the values attributed to the pharmaceuticals were based primarily on prices stipulated in the Ontario drug benefit formulary. The rationale for this approach was that the donor and donee were resident in Ontario. Mr. Zive testified that the price stated in the formulary was assumed to be the fair market value of the pharmaceuticals he reviewed.

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[126] Lines 22 to 28 of page 1332 and lines 1 to 7 of page 1333 of the Transcript.
[127] The in-kind gift rules in subsections 248(35) to (37) of the ITA did not apply to Mr. Morrison's gift to EBF in 2003. Those rules would deem the gift to be the lesser of the cost to Mr. Morrison of the pharmaceuticals and the fair market value of the pharmaceuticals.
[128] Lines 3 to 22 of page 886 of the Transcript.

[127] I have heard no evidence that establishes that the generic drugs identified with the CGI Program and the CHT Program could be imported into Canada for sale. Since the pharmaceuticals were not (and could not be) imported into Canada for sale, the approach to valuation adopted for the CGI Program is patently flawed since it is using a Canadian market (Ontario) to value generic pharmaceuticals that cannot be sold in that market.

[128] The evidence does establish that an arm's length purchase price for the pharmaceuticals in the relevant international market was less than $9,500. For example, the purchase price paid to CGI under the purchase agreement executed by Mr. Morrison (Exhibit R-2) included all "insuring, packaging, shipping and delivering" costs, from which I infer that the purchase price paid by CGI for the pharmaceuticals was considerably less than the $9,500 paid by Mr. Morrison. The Minister assumed that the $9,500 purchase price also included a fee to CGI and there was no evidence to demolish that assumption.[129] Common sense tells me that a significant portion of the $9,500 was retained by CGI to pay its expenses (including those relating to the promotion of the CGI Program) and to earn a profit.

[129] Mr. Morrison did not present independent evidence of the fair market value of the pharmaceuticals he donated to EBF in 2003. The Minister assumed that "the fair market value of the Pharmaceuticals at the time they were gifted by the Appellant in 2003 did not exceed $1,759.80 as set out in the 2003 International Drug Price Indicator Guide".[130] For the reasons already given, the valuations used by the CGI Program to issue tax receipt were patently flawed and do not demolish this assumption.

[130] While I accept that it is possible to purchase pharmaceuticals for less than their "fair market value" and donate them to a registered charity, and that the ultimate recipient of the pharmaceuticals may consider them to be "priceless", Mr. Morrison has provided no reliable evidence of the fair market value of the pharmaceuticals at the time that he donated the pharmaceuticals. Accordingly, I find that the pharmaceuticals donated by Mr. Morrison to EBF in 2003 had a fair market value no greater than $1,759.80.

[131] Subsection 248(30) of the ITA does not assist Mr. Morrison because the existence of Mr. Morrison's gift to EBF in 2003 is not in issue, only the fair market value of the gift. Mr. Morrison acquired pharmaceuticals worth $1,759.80 for

[129] Paragraph 14(s) of the Morrison 2003 Reply.
[130] Paragraph 14(hh) of the Morrison 2003 Reply.

$9,500 and donated those pharmaceuticals to EBF. There is no benefit associated with overpaying for the pharmaceuticals. While Mr. Morrison may have received a tax receipt for $56,502.80, based on the assumed facts and the evidence the inflated amount of the tax receipt was not a result of "pretence documents" and therefore was not a benefit that vitiated the gift.[131]

C. The CHT Program

(1) The Reassessments in Issue

[132] The Minister initially reassessed the Appellants to disallow the Appellants' claims for charitable donation tax credits in 2004 (for Mr. Morrison) and 2005 (for both Appellants). After the Appellants filed notices of objection to these reassessments, the Minister reassessed the Appellants' 2005 taxation years to allow each of them a charitable donation tax credit based on the amount of the cash donations reported by the Appellants in their tax returns for the 2005 taxation year.

[133] Accordingly, for the 2005 taxation year only, Mr. Eisbrenner was allowed a charitable donation tax credit for a cash gift, of $39,966 and Mr. Morrison was allowed a charitable donation tax credit for a cash gift of $15,075.

(2) The In-Kind Donations

[134] The Respondent submits that neither of the Appellants made a common law gift to CKF or MCF in 2004 and 2005, that even if there was a gift, the amount of the advantage in respect of the gift reduced the eligible amount of the gift to nil, and that in any event the value attributed to the pharmaceuticals identified in the tax receipts issued to the Appellants was very significantly above the fair market value of the pharmaceuticals in the market in which they were acquired and used.

[135] Under common law, for there to be a gift there must be (1) an intention to make a gift on the part of the donor, without consideration or expectation of remuneration, (2) an acceptance of the gift by the donee, and (3) a sufficient act of

[131] *The Queen v. Castro*, 2015 FCA 225 ("*Castro*") at paragraphs 45 to 48. Unlike in *The Queen v. Berg*, 2014 FCA 25, Mr. Morrison did not enter into a complex series of transactions to deceive the tax authorities. He simply purchased pharmaceuticals, donated them to a charity and reported a capital gain based on the price he actually paid for the pharmaceuticals and the fair market value attributed to the pharmaceuticals by the charity.

delivery or transfer of the property to complete the transaction.[132] I will address the third requirement first.

[136] The evidence establishes that the Appellants applied to WHI to be appointed Class A beneficiaries of CHT and received from CHT certificates purportedly representing ownership in specific pharmaceuticals.[133] These certificates were then transferred by the Appellants to CKF or MCF. The certificates are the sole evidence of the acquisition, ownership and transfer of pharmaceuticals by the Appellants.

[137] Mr. O'Brien testified that CPAR acquired ownership of the pharmaceuticals from MCF through the certificate only and that his understanding was that MCF received the certificate from the individual donors. Mr. Barnett testified that EBF would receive certificates of trust units. Neither Mr. O'Brien nor Mr. Barnett knew how the pharmaceuticals entered the CHT Program.

[138] Neither Appellant could identify the pharmaceuticals purportedly represented by the certificates acquired from CHT. The only documents explicitly identifying pharmaceuticals purportedly donated to CKF and MCF are the tax receipts prepared by Matthew Rosen.

[139] In the Morrison 2014 Reply, the Minister pleaded the following assumptions of fact:

- there was no evidence that the pharmaceuticals existed
- participants never took possession of, nor acquired title to, any pharmaceuticals
- the registered Canadian charities never took possession of any pharmaceuticals in Canada
- no pharmaceuticals related to the CHT Program ever entered Canada
- CHT never acquired title to the pharmaceuticals
- if the pharmaceuticals existed

[132] *McNamee v. McNamee*, 2011 ONCA 533 at paragraphs 23 to 25.
[133] Exhibits A-24 and A-29 for Mr. Eisbrenner and Exhibit R-20 for Mr. Morrison.

- Crunin acquired the pharmaceuticals in bulk from a Cyprian company, KP Innovispharm Limited, and settled them on CHT

- the fair market value of the pharmaceuticals at the time the participants transferred them to the registered Canadian charity was no more than what Crunin paid to KP Innovispharm Limited[134]

[140] In the Morrison 2004 Reply, the Minister pleaded the following material facts:

- Despite the assumptions made in paragraphs 14(mm)(i) to (iv) the Minister now states that:

  - KP Innovispharm never purchased the pharmaceuticals

  - KP Innovispharm never owned the pharmaceuticals

  - KP Innovispharm never had title to the pharmaceuticals

- Despite the assumption made in paragraph 14(mm)(i) the Minister now states that Crunin never acquired any pharmaceuticals from KP Innovispharm[135]

[141] In the Eisbrenner Reply and the Morrison 2005 Reply, the Minister pleaded the following assumptions of fact:

- participants never took physical possession of, nor acquired title to, any pharmaceuticals

- the in-kind charities never took possession of any pharmaceuticals in Canada

- no pharmaceuticals related to the CHT Program ever entered Canada;

- CHT never acquired title to the pharmaceuticals

[134] Paragraphs 14(hh) to (ll) and subparagraphs 14(mm)(i) and (v) of the Morrison 2004 Reply.
[135] Paragraphs 15 and 16.

- Crunin acquired the pharmaceuticals in bulk from KP Innovispharm
- the fair market value of the pharmaceuticals at the time the participants transferred them to the in-kind charities was no more than what Crunin paid to KP Innovispharm[136]

[142] In the Morrison 2005 Reply and the Eisbrenner Reply, the Minister pleaded the following material facts:

- Despite the assumptions made in paragraphs 13(nn), (oo), (pp) and (qq) the Minister now states that:
    - KP Innovispharm never purchased the pharmaceuticals;
    - KP Innovispharm never owned the pharmaceuticals;
    - KP Innovispharm never had title to the pharmaceuticals.
- Despite the assumption made in paragraph 13(nn) Crunin never acquired any pharmaceuticals from KP Innovispharm[137]

[143] The Morrison 2004 Reply states as an assumption of fact that CHT never acquired title to the pharmaceuticals but as an alternative assumption of fact that Crunin acquired and then settled pharmaceuticals on CHT and that the fair market value of the pharmaceuticals at the time the participants transferred them to the in-kind charities was no more than what Crunin paid to KP Innovispharm.

[144] The Morrison 2005 Reply and the Eisbrenner Reply do not explicitly present alternative assumptions of fact and do not assume that Crunin settled pharmaceuticals on CHT. Nevertheless, the assumption that CHT never acquired title to the pharmaceuticals is still not consistent with the assumption that the fair market value of the pharmaceuticals at the time the participants transferred them to the in-kind charities was no more than what Crunin paid to KP Innovispharm.

[145] The Federal Court of Appeal has held that while the Minister may put forward different legal arguments based on the same facts, the Minister cannot

[136] Paragraphs 13(jj) to (nn) and 13(rr) of the Morrison 2005 Reply and paragraphs 18(kk) to (oo) and 18(ss) of the Eisbrenner Reply.
[137] Paragraphs 14 and 15 of the Morrison 2005 Reply and paragraphs 19(a),(b),(c) and (d) of the Eisbrenner Reply.

plead alternative assumed facts "when to do so would fundamentally alter the basis on which his assessment was based as to render it an entirely new assessment".[138]

[146] It is unclear that the alternative assumptions of fact stated in the aforementioned replies fundamentally alter the basis of the reassessments in issue since the Minister's assessing position was and still is that there was no valid gift of the pharmaceuticals to a registered charity. Either version of the facts supports that assessing position. In any event, to the extent that there are "alternative" or "inconsistent" assumptions, I read *Schultz* to say that only the "alternative" or "inconsistent" assumptions should be disregarded.

[147] In the end, these issues are moot because the Respondent did plead material facts in place of the alternative assumptions of fact in the Morrison 2004 Reply and the inconsistent facts in the Morrison 2005 Reply and the Eisbrenner Reply and led evidence in support of those material facts.

[148] Mr. Morrison and Mr. Eisbrenner had no knowledge of any of the assumptions of fact and material facts set out above and provided no evidence in support of the acquisition of any pharmaceuticals by CHT apart from the certificates purporting to transfer title to pharmaceuticals to the Appellants.

[149] The Respondent introduced the Invoices and the Bank Statements into evidence to establish that the pharmaceuticals identified with the CHT Program by WHI were sold by the manufacturers of those pharmaceuticals directly to Amstelfarma, PK Bonapharm and Medpharm, and that no monies were disbursed from KP Innovispharm's bank account in Cyprus to pay for pharmaceuticals.

[150] For the sales to Medpharm and PK Bonapharm, the Invoices frequently identify Amstelfarma as the consignee (i.e., the person to which the pharmaceuticals were delivered). None of the Invoices provided by the manufacturers indicate a sale of the pharmaceuticals to KP Innovispharm, Crunin or CHT, nor do they refer to delivery of the pharmaceuticals to KP Innovispharm, Crunin or CHT.

[151] Mr. Zive testified that he inspected pharmaceuticals associated with the CHT Program at Amstelfarma's warehouse in Holland. Mrs. Gremyachev testified that Universal Aide assisted in shipping pharmaceuticals to charities in various countries for distribution in those countries. Mr. Zive, Mr. O'Brien and Mr. Barnett

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[138] *Schultz v. The Queen*, [1996] 1 F.C. 423 ("*Schultz*") at paragraph 24.

testified that pharmaceuticals were accumulated or stored by Amstelfarma in its warehouse in Holland before being shipped to charities based in various foreign countries. No witness had independent knowledge of how the pharmaceuticals were acquired, or which entity acquired the pharmaceuticals.

[152] Based on the totality of the evidence of Mr. Monahan regarding the results of the audit of the CHT Program and the absence of any evidence to the contrary, I conclude that the certificates received by the Appellants from CHT are not reliable evidence that pharmaceuticals were acquired by CHT and were distributed by CHT to the Appellants. I find as a fact that the certificates were simply worthless pieces of paper used by WHI to give participants in the CHT Program the impression that pharmaceuticals passed from CHT to the participants and from the participants to the in-kind charities when in fact the pharmaceuticals associated with the CHT Program were sold by the manufacturers of those pharmaceuticals directly to offshore entities, were accumulated in a warehouse in Holland and were then distributed to charities in various countries to provide a veneer of charitable activity which WHI (through CDL) could use to market the CHT Program.

[153] Accordingly, I conclude that Mr. Morrison did not make a gift in kind of pharmaceuticals to MCF in 2004 or to CKF in 2005 and that Mr. Eisbrenner did not make two gifts in kind of pharmaceuticals to CKF in 2005 because the third requirement for a common law gift of property that there be a sufficient act of delivery or transfer of the property is not met. Simply stated, regardless of the representations of WHI in the CHT Program materials (including the certificates), the Appellants had no pharmaceuticals to gift to MCF and CKF.

(3) The Cash Donations

[154] The reassessments of the Appellants' 2005 taxation years allowed a charitable donation tax credit for the cash donations to PCWF reported by the Appellants for that year. Accordingly, only Mr. Morrison's claim for a charitable donation tax credit for the $15,530 cash donation he reported in his tax return for the 2004 taxation year is in issue in these appeals.

[155] In reassessing Mr. Morrison's 2004 taxation year, the Minister assumed as a fact that Mr. Morrison's payment by a cheque issued to D&H LLP in trust for ADRA (Exhibit R-14) was a fee for Mr. Morrison's participation in the CHT Program.[139] The Minister further assumed as a fact that the charities involved in the

[139] Paragraph 14(ss) of the Morrison 2004 Reply.

CHT Program retained no more than 3.3% of the cash donated by the participants in the CHT Program to the cash charities.[140]

[156] The Respondent submits that Mr. Morrison's $15,530 payment in 2004 was not a gift under common law because it was a payment made with the expectation of receiving, in exchange, significant economic benefits in the form of inflated charitable donation receipts and associated charitable donation tax credits. The Respondent further submits that Mr. Morrison did not make the cash payment to a registered charity but to a lawyer in trust and that only 1% of the payment was ultimately received by the receipting cash charity.

[157] Mr. Morrison submits that the $15,530 payment in 2004 was a gift and because it was more than 20% of the total gifts claimed by him in 2004 in respect of the CHT Program, subsection 248(30) of the ITA operates to allow the cash portion of the gifts.

[158] I accept that Mr. Morrison issued a cheque in the amount of $15,530 in good faith to D&H LLP in trust for the benefit of ADRA as a gift to that charity. The cash gift was paid by Mr. Morrison from his own funds. While Mr. Morrison may have expected to receive, in exchange for the payment, pharmaceuticals from CHT to donate to an in-kind charity, the legal and economic reality is that contrary to the representations in the marketing materials prepared by CDL for WHI, he received no pharmaceuticals from CHT and donated nothing of value to MCF in 2004. Accordingly, the cash donation resulted in no adjunct benefit to Mr. Morrison.

[159] In *The Queen v. Friedberg*, 92 D.T.C. 6031 (F.C.A.), the Federal Court of Appeal recognized that to vitiate a gift, a benefit or consideration must actually flow to the donor:

> . . . a gift is a voluntary transfer of property owned by a donor to a donee, in return for which **no benefit or consideration flows to the donor** (at 6032).[141]
>
> [Emphasis added.]

[160] The receipt of an inflated tax receipt for the in-kind donation to MCF in 2004 is not a benefit to Mr. Morrison in and of itself.[142] While the certificate

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[140] Paragraph 14(cc) of the Morrison 2004 Reply.
[141] This definition was cited with approval by the Federal Court of Appeal in *Maréchaux v. The Queen*, 2010 FCA 287, which was in turn cited by the Court in *Kossow v. The Queen*, 2013 FCA 283.
[142] *Castro*, *supra*.

misrepresented what was actually going on from a legal and economic perspective, I find that Mr. Morrison had no part in the misrepresentation and I accept that Mr. Morrison genuinely believed that in addition to the cash he was donating pharmaceuticals received from CHT to MCF. In other words, Mr. Morrison was not a willing or knowing participant in the use of "pretense documents".

[161] It appears from the limited information available that only a very small percentage of the cash donated to cash charities was retained by the charities involved in the CHT Program. The Minister assumed between 3% and 3.3% and there was no evidence to contradict those assumptions. However, I accept that Mr. Morrison had no knowledge of how the cash would be disbursed once gifted to the cash charity. I believe it is reasonable to assume that in most cases an individual donating cash to a Canadian registered charity is unlikely to request an accounting of precisely how the charity disburses the cash donation. The marketing materials certainly suggest that the cash donation was in aid of the broader charitable undertaking of distributing needed pharmaceuticals to recipients in foreign countries. I note in this regard that in *Leary v. Federal Commissioner of Taxation*, Federal Court of Australia (1980), 80 ATC 4438, Bowen C.J. observed:

> If a taxpayer makes a genuine gift by way of benefaction to a prescribed body, he should not be defeated in claiming his allowable deduction simply because that body, without his knowledge or participation, chooses to make some unusual arrangement to deal with the money.[143]

[162] I reject the Respondent's position that the cash donation was a fee payable to participate in the CHT Program.[144] The participants in the CHT Program may have been encouraged to make a cash donation but the documents do not suggest that there was an obligation to make such a donation and the uncontradicted evidence of the Appellants is that neither was told that they had to make a cash donation.[145] WHI created a structure which might have led Mr. Morrison to believe that it was more likely that he would be appointed a Class A beneficiary if he made a cash donation but there is no evidence that he was obligated to make a cash donation, that the cash donation was a condition precedent to appointment as a Class A beneficiary or that the cash donation was a fee payable for appointment as a Class A beneficiary. Mr. Miller testified that individuals had been appointed Class A

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[143] Page 4444.

[144] Mr. Morrison denied that the $15,350 payment was a fee and stated that it was a donation: lines 26 to 28 of page 116 and lines 1 to 2 of page 117 of the Transcript.

[145] Mr. Miller testified that agents were instructed not to guarantee participants that they would be appointed a Class A beneficiary of CHT.

beneficiaries even though their cheques had bounced.[146] Counsel for the Respondent suggested this was due to administrative expediency, but Mr. Miller stated that he did not recall that being the case.[147]

[163] Mr. Morrison claimed a charitable donation tax credit for a cash donation to Beauvallon Adventist Community Services Society ("BACSS") in 2004.[148] The cheque for Mr. Morrison's cash donation in 2004 is made out to D&H LLP in trust for ADRA.[149] Mr. Morrison did not know whether ADRA had changed its name to BACSS and he could not explain why he issued a cheque in trust for ADRA but was issued a receipt by BACSS.[150] However, the Morrison 2004 Reply states in paragraph 14(tt) that the Minister assumed as a fact that ADRA was registered for charitable purposes as BACSS and the Respondent did not pursue the discrepancy.

[164] Based on the foregoing, I conclude that Mr. Morrison made a cash gift of $15,350 to BACSS/ADRA in 2004 and is entitled to the charitable donation tax credit available under section 118.1 of the ITA in respect of that gift.

These Reasons for Judgment are issued in substitution for the Reasons for Judgment dated November 7, 2018.

Signed at Ottawa, Canada, this **23rd** day of November 2018.

"J.R. Owen"

Owen J.

[146] Lines 11 to 17 of page 390 of the Transcript.
[147] Lines 18 to 23 of page 390 of the Transcript.
[148] The receipt is included with his 2004 income tax return: Exhibit R-10. A separate copy of the receipt is Exhibit R-18.
[149] Exhibit R-14.
[150] Lines 22 to 28 of page 119 and lines 1 to 16 of page 120 of the Transcript and Exhibits R-18 and R-14.

APPENDIX A

The assumptions of fact set out in the Morrison 2004 Reply are as follows:

14. In determining the Appellant's tax liability for the 2004 taxation year, the Minister made the following assumptions of fact:

A. <u>The parties</u>

(a) the Canadian Humanitarian Trust Tax Shelter (#TS069310) is a gifting arrangement tax shelter (the "CHT Arrangement");

(b) in 2004, the CHT Arrangement was comprised of six (6) Canadian Humanitarian Trusts (the "CHT Trusts");

(c) in February, 2004, 2040126 Ontario Inc. filed an application for a tax shelter identification number for the purposes of creating the CHT Arrangement;

(d) 2040126 Ontario Inc., operating as World Health Initiatives, (the "Promoter") was incorporated on January 30, 2004, and is the promoter of the CHT Arrangement;

(e) Cambridge Charity Consultants Inc. is the sole shareholder of the Promoter;

(f) Mr. Stephen Rosen is the director of Cambridge Charity Consultants Inc.;

(g) Lafter Corp. and Bless the Name are the shareholders of Cambridge Charity Consultants Inc.;

(h) Lafter Corp. is owned by Mr. Stephen Rosen;

(i) Bless the Name is jointly owned by Mr. Zale Newman and his wife Mrs. Rachel Newman;

(j) Canadian Donations Limited was responsible for the marketing for the Promoter which included providing seminars directed at recruiting participants in the CHT arrangement;

(k) Back Office Systems Limited was a service provider for the purposes of the CHT Arrangement which involved general administration duties including the issuing of tax receipts on behalf of the charities involved in the CHT Arrangement;

(l) Matthew Rosen, Stephen Rosen's son, is the sole shareholder and president of Back Office Systems Limited;

(m) CET Fiduciary Services Ltd. (the "Trustee") is the trustee of the CHT Trusts and is a corporation resident in Ontario;

(n) the CHT Trusts were settled in Ontario by Crunin Investments Limited BVI (the "Settlor"), a corporation resident in the British Virgin Islands;

B. The CHT Arrangement

(o) the stated purpose of the CHT Arrangement was to provide support for recognized Canadian charitable organizations and to assist in the international relief of poverty by offering humanitarian aid, in the form of pharmaceuticals, for distribution in developing countries;

(p) the Promoter advertised a return on cash of 41% to 72% to potential participants with respect to the CHT Arrangement;

(q) the return on cash as advertised by the Promoter is comprised entirely of tax savings;

(r) participants in the CHT Arrangement made cash payments to a designated Canadian registered charity;

(s) participants could only choose to donate the cash payments to one of three registered Canadian charities: Alberta Distribution Relief Agency Adventist Society International, Phoenix Community Works Foundation and Living Waters Ministry Trust;

(t) the cash payment made by each participant was a fee payable by participants in order to participate in the CHT Arrangement;

(u) concurrent with the cash payments, participants completed an application to become a "Class A" beneficiary of the CHT Arrangement;

(v) participants understood that becoming a "Class A" beneficiary of the CHT Arrangement entitled them to ownership of pharmaceutical units (the "Pharmaceuticals");

(w) in the application to become a "Class A" beneficiary of the CHT Arrangement, participants indicated a value of the Pharmaceuticals they wished to receive;

(x) once the participants were accepted as "Class A" beneficiaries of the CHT Arrangement, they completed and signed a Deed of Gift;

(y) participants could only designate that the recipients of the Pharmaceuticals be either the Choson Kallah Fund of Toronto or Meoroth, two registered Canadian charities chosen by the Promoter;

(z) participants received two donation receipts; one from one of the designated charities referred to in paragraph (s) above for the cash payment to the CHT Arrangement, and another from one of the designated charities referred to in paragraph (y) above for the Pharmaceuticals;

C. Use of cash received through the CHT Arrangement

(aa) in 2004, approximately 6,200 taxpayers participated in the CHT Arrangement;

(bb) the total cash payments made by the 6,200 participants was $47,421,298;

(cc) in 2004, the registered Canadian charities involved with the CHT Arrangement retained no more than 3.3% of the total cash payments by the participants;

(dd) the distribution of the $47,421,298 was as follows:

i) $2,321,377 was paid as fees by the registered Canadian charities to the Promoter of the CHT Arrangement;

ii) $16,444,898 was paid to Canadian Donations Limited;

iii) $26,592,182 was wire transferred to a bank account in Cyprus;

iv) $500,000 was set aside as a defence fund, in the event of reassessment by the Minister; and

v) $1,562,841 was retained by the registered Canadian charities.

(ee) the cash amounts were not paid directly to any of the three registered Canadian charities named in paragraph (s) but were paid to a solicitor's trust account;

(ff) all transactions relating to the CHT Arrangement were pre-arranged, required no input or involvement of the participants other than the cash payment and the execution of certain documents;

(gg) transactions in the CHT Arrangement, such as the issuing of receipts and preparing other necessary paperwork, were performed by the Promoter or other pre-arranged third parties;

D. The purported Pharmaceuticals

(hh) there was no evidence that the Pharmaceuticals existed;

(ii) participants never took possession of, nor acquired title to, any Pharmaceuticals;

(jj) the registered Canadian charities never took possession of any Pharmaceuticals in Canada;

(kk) no Pharmaceuticals related to the CHT Arrangement ever entered Canada;

(ll) the CHT Trusts never acquired title to the Pharmaceuticals;

(mm) if the Pharmaceuticals existed:

i) the Settlor acquired the Pharmaceuticals in bulk from a Cyprian company, KP Innovispharm Limited, and settled them on the CHT Trusts;

ii) the Settlor secured the purchase of the Pharmaceuticals by a promissory note and a lien given by the Settlor (the "Lien");

iii) the Lien was in place at the time participants acquired their Pharmaceuticals and remained in place at the time of the transfer of the Pharmaceuticals;

iv) the Settlor paid no more for the Pharmaceuticals than the amount of the Lien;

v) the fair market value of the Pharmaceuticals at the time the participants transferred them to the registered Canadian charity was no more than what the Settlor paid to KP Innovispharm Limited an amount corresponding to the Lien;

vi) the Pharmaceuticals were manufactured and purchased in a market outside of Canada and were distributed from the offshore manufacturers to third world countries for the purposes of humanitarian relief;

vii) the Pharmaceuticals were never intended to be imported into Canada; and

viii) the Pharmaceuticals were never intended to be used by Canadian consumers.

(nn) appraisals of Pharmaceuticals were provided for the purposes of the CHT Arrangement and were commissioned by the Trustee and the designated registered Canadian charities;

(oo) these appraisals do not accurately reflect the fair market value of the Pharmaceuticals;

E. <u>The Appellant's participation in the CHT Arrangement</u>

(pp) in 2004 the Appellant participated in the CHT Arrangement;

(qq) by application dated September 28, 2004, the Appellant applied to the Trustee to be a "Class A" beneficiary of the CHT Arrangement and to have pharmaceutical units, stated to be valued at Cdn $50,000, distributed to him. The application was granted;

(rr) in support of his application, the Appellant made a cash payment of $15,350 to Daigle and Hancock LLP in trust for Alberta Distribution Relief Agency Adventist Society International;

(ss) the cash payment referred to in paragraph (rr) above was a fee the Appellant paid in order to participate in the CHT Arrangement;

(tt) the Appellant received from the Alberta Distribution Relief Agency, registered for charitable purposes as Beauvallon Adventist Community Services Society, a charitable donation receipt in the amount of $15,350 dated November 24, 2004;

(uu) no more than 3.3% of the Appellant's $15,350 cash payment was distributed to the Alberta Distribution Relief Agency Adventist Society International;

(vv) the Appellant never took possession of, nor acquired titled to, any Pharmaceuticals;

(ww) the Appellant signed a Deed of Gift dated October 15, 2004, which stated that the Appellant transferred Pharmaceuticals acquired through the CHT Arrangement, valued at Cdn $50,000, to Meoroth;

(xx) the Appellant received from Meoroth a charitable donation receipt in the amount of $41,108.82 dated November 24, 2004;

(yy) the fair market value of the Pharmaceuticals was no more than the Lien on those Pharmaceuticals; and

(zz) the Appellant entered into the CHT Arrangement to secure for himself a tax benefit in excess of his cash payment and not make a charitable gift to a registered Canadian charity.

The assumptions of fact set out in the Morrison 2005 Reply are as follows:

13. In determining the Appellant's tax liability for the 2005 taxation year, the Minister made the following assumptions of fact:

A. <u>The parties</u>

(a) the Canadian Humanitarian Trust Tax Shelter (#TS069310) is a gifting arrangement tax shelter (the "CHT Arrangement");

(b) in 2005, the CHT Arrangement was comprised of ten (10) Canadian Humanitarian Trusts (the "CHT Trusts");

(c) in February 2004, 2040126 Ontario Inc. filed an application for a tax shelter identification number for the purposes of creating the CHT Arrangement;

(d) 2040126 Ontario Inc., operating as World Health Initiatives, (the "Promoter") was incorporated on January 30, 2004, and is the promoter of the CHT Arrangement;

(e) Cambridge Charity Consultants Inc. is the sole shareholder of the Promoter;

(f) Mr. Stephen Rosen is the director of Cambridge Charity Consultants Inc. and president of the Promoter;

(g) Lafter Corp. and Bless the Name are the shareholders of Cambridge Charity Consultants Inc.;

(h) Lafter Corp. is owned by Mr. Stephen Rosen;

(i) Bless the Name is jointly owned by Mr. Zale Newman and his wife Mrs. Rachel Newman;

(j) Canadian Donations Limited was responsible for the marketing for the Promoter which included providing seminars directed at recruiting participants in the CHT Arrangement;

(k) Back Office Systems Limited was a service provider for the purposes of the CHT Arrangement which involved general administration duties including the issuing of tax receipts on behalf of the charities involved in the CHT Arrangement;

(l) Matthew Rosen, Stephen Rosen's son, is the sole shareholder and president of Back Office Systems Limited;

(m) CET Fiduciary Services Ltd. (the "Trustee") is the trustee of the CHT Trusts and is a corporation resident in Ontario;

(n) the CHT Trusts were settled in Ontario by Crunin Investments Limited BVI (the "Settlor"), a corporation resident in the British Virgin Islands;

B. <u>The CHT Arrangement</u>

(o) the stated purpose of the CHT Arrangement was to provide support for recognized Canadian charitable organizations and to assist in the international relief of poverty by offering humanitarian aid, in the form of pharmaceuticals, for distribution in developing countries;

(p) the Promoter advertised a return on cash of 41% to 94% to potential participants with respect to the CHT Arrangement;

(q) the return on cash as advertised by the Promoter is comprised entirely of tax savings;

(r) participants in the CHT Arrangement made cash payments to a designated Canadian registered charity;

(s) participants could only choose to donate the cash payments to one of three registered Canadian charities: Alberta Distribution Relief Agency Adventist Society International, Phoenix Community Works Foundation and Living Waters Ministry Trust;

(t) the cash payment made by each participant was a fee payable by participants in order to participate in the CHT Arrangement;

(u) concurrent with the cash payments, participants completed an application to become a "Class A" beneficiary of the CHT Arrangement;

(v) participants understood that becoming a "Class A" beneficiary of the CHT Arrangement entitled them to ownership of pharmaceutical units (the "Pharmaceuticals");

(w) in the application to become a "Class A" beneficiary of the CHT Arrangement, participants indicated a value of the Pharmaceuticals they wished to receive;

(x) once the participants were accepted as "Class A" beneficiaries of the CHT Arrangement, they completed and signed a Deed of Gift;

(y) participants could only designate that the recipients of the Pharmaceuticals be either the Choson Kallah Fund of Toronto or Resources for Life Foundation, two registered Canadian charities chosen by the Promoter;

(z) participants received two donation receipts; one from one of the designated charities referred to in paragraph (s) above for the cash payment to the CHT Arrangement, and another from one of the designated charities referred to in paragraph (y) above for the Pharmaceuticals;

C. <u>Use of cash received through the CHT Arrangement</u>

(aa) in 2005, approximately 9,710 taxpayers participated in the CHT Arrangement;

(bb) the total cash payments made by the 9,710 participants was $79,473,811;

(cc) in 2005, the three registered Canadian charities referred to in paragraph (s) above retained no more than 3% of the total cash payments by the participants;

(dd) under agreements made with the Promoter, each of the three registered Canadian charities received no more than 1% of the total of the cash payments made to it;

(ee) the distribution of the $79,473,811 was as follows:

i) $6,147,795 was paid as fees by the registered Canadian charities to the Promoter of the CHT Arrangement;

ii) $26,251,748 was paid to Canadian Donations Limited;

iii) $40,712,695 was wire transferred to a bank account in Cyprus; and

iv) $3,234,907 was retained by the registered Canadian charities.

(ff) $500,000 was set aside in 2004 as a defence fund, in the event of reassessment by the Minister;

(gg) the cash amounts were not paid directly to any of the three registered Canadian charities named in paragraph (s) but were paid to a solicitor's trust account;

(hh) all transactions relating to the CHT Arrangement were pre-arranged, required no input or involvement of the participants other than the cash payment and the execution of certain documents;

(ii) transactions in the CHT Arrangement, such as the issuing of receipts and preparing other necessary paperwork, were performed by the Promoter or other pre-arranged third parties;

D. The purported Pharmaceuticals

(jj) participants never took possession of, nor acquired title to, any Pharmaceuticals;

(kk) the registered Canadian charities referred to in paragraph (y) never took possession of any Pharmaceuticals in Canada;

(ll) no Pharmaceuticals related to the CHT Arrangement ever entered Canada;

(mm) the CHT Trusts never acquired title to the Pharmaceuticals;

(nn) the Settlor acquired the Pharmaceuticals in bulk from a Cyprian company, KP Innovispharm Limited;

(oo) the Settlor secured the purchase of the Pharmaceuticals by a promissory note and a lien given by the Settlor (the "Lien");

(pp) the Lien was in place at the time participants acquired their Pharmaceuticals and remained in place at the time of the transfer of the Pharmaceuticals;

(qq) the Settlor paid no more for the Pharmaceuticals than the amount of the Lien;

(rr) the fair market value of the Pharmaceuticals at the time the participants transferred them to the registered Canadian charity was no more than what the Settlor paid to KP Innovispharm Limited;

(ss) the Pharmaceuticals were manufactured and purchased in a market outside of Canada and were distributed from the offshore manufacturers to third world countries for the purposes of humanitarian relief;

(tt) the Pharmaceuticals were never intended to be imported into Canada;

(uu) the Pharmaceuticals were never intended to be used by Canadian consumers;

(vv) appraisals of Pharmaceuticals were provided for the purposes of the CHT Arrangement and were commissioned by the Trustee and the designated registered Canadian charities;

(ww) these appraisals do not accurately reflect the fair market value of the Pharmaceuticals;

E. The Appellant's participation in the CHT Arrangement

(xx) in 2005 the Appellant participated in the CHT Arrangement;

(yy) the Appellant applied to the Trustee to be a "Class A" beneficiary of the CHT Arrangement and to have pharmaceutical units distributed to him. The application was granted;

(zz) in support of his application, the Appellant made a cash payment of $15,075 to Jonathan J. Sommer LLP in trust for Phoenix Community Works Foundation;

(aaa) the cash payment referred to in paragraph (zz) above was a fee the Appellant paid in order to participate in the CHT Arrangement;

(bbb) the Appellant received from the Phoenix Community Works Foundation, a charitable donation receipt in the amount of $15,075 dated November 15, 2005;

(ccc) no more than 1% of the Appellant's $15,075 cash payment was distributed to the Phoenix Community Works Foundation;

(ddd) the Appellant never took possession of, nor acquired title to, any Pharmaceuticals;

(eee) the Appellant signed a Deed of Gift which stated that the Appellant transferred Pharmaceuticals acquired through the CHT Arrangement to Choson Kallah Fund of Toronto;

(fff) the Appellant received from Choson Kallah Fund of Toronto a charitable donation receipt in the amount of $37,815.15 dated December 7, 2005;

(ggg) the fair market value of the Pharmaceuticals was no more than the Lien on those Pharmaceuticals; and

(hhh) the Appellant entered into the CHT Arrangement to secure for himself a tax benefit in excess of his cash payment and not to make a charitable gift to a registered Canadian charity.

The assumptions of fact set out in the Eisbrenner Reply are as follows:

18. In determining the appellant's tax liability for the 2005 and 2006 taxation years, the Minister made the following assumptions of fact:

The parties

(a) the Canadian Humanitarian Trust Tax Shelter (#TS069310) is a gifting arrangement tax shelter (the "CHT Arrangement");

(b) in 2005, the CHT Arrangement was comprised of ten (10) Canadian Humanitarian Trusts (the "CHT Trusts");

(c) in 2006, the CHT Arrangement was comprised on seven (7) CHT Trusts;

(d) in February, 2004, 2040126 Ontario Inc. filed an application for a tax shelter identification number for the purposes of creating the CHT Arrangement;

(e) 2040126 Ontario Inc., operating as World Health Initiatives, (the "Promoter") was incorporated on January 30, 2004, and is the promoter of the CHT Arrangement;

(f) Cambridge Charity Consultants Inc. is the sole shareholder of the Promoter;

(g) Mr. Stephen Rosen is the director of Cambridge Charity Consultants Inc.;

(h) Lafter Corp. and Bless the Name are the shareholders of Cambridge Charity Consultants Inc.;

(i) Lafter Corp. is owned by Mr. Stephen Rosen;

(j) Bless the Name is jointly owned by Mr. Zale Newman and his wife Mrs. Rachel Newman;

(k) Canadian Donations Limited was responsible for the marketing for the Promoter which included providing seminars directed at recruiting participants in the CHT arrangement;

(l) Back Office Systems Limited was a service provider for the purposes of the CHT Arrangement which involved general administration duties including the issuing of tax receipts on behalf of the charities involved in the CHT Arrangement;

(m) Matthew Rosen, Stephen Rosen's son, is the sole shareholder and president of Back Office Systems Limited;

(n) CET Fiduciary Services Ltd. (the "Trustee") is the trustee of the CHT Trusts and is a corporation resident in Ontario;

(o) the CHT Trusts were settled in Ontario by Crunin Investments Limited BVI (the "Settlor"), a corporation resident in the British Virgin Islands;

The CHT Arrangement

(p) the stated purpose of the CHT Arrangement was to provide support for recognized Canadian charitable organizations and to assist in the international relief of poverty by offering humanitarian aid, in the form of pharmaceuticals, for distribution in developing countries;

(q) the Promoter advertised a return on cash of 41% to 72% to potential participants with respect to the CHT Arrangement;

(r) the return on cash as advertised by the Promoter is comprised entirely of tax savings;

(s) participants in the CHT Arrangement made cash payments to a designated Canadian registered charity;

(t) participants could only choose to donate the cash payments to one of three registered Canadian charities: Alberta Distribution Relief Agency Adventist Society International, Phoenix Community Works Foundation and Living Waters Ministry Trust (the "cash charities");

(u) the cash payment made by each participant was a fee payable by participants in order to participate in the CHT Arrangement;

(v) concurrent with the cash payments, participants completed an application to become a "Class A" beneficiary of the CHT Arrangement;

(w) participants understood that becoming a "Class A" beneficiary of the CHT Arrangement entitled them to ownership of pharmaceutical units (the "Pharmaceuticals");

(x) in the application to become a "Class A" beneficiary of the CHT Arrangement, participants indicated a value of the Pharmaceuticals they wished to receive;

(y) once the participants were accepted as "Class A" beneficiaries of the CHT Arrangement, they completed and signed a Deed of Gift;

(z) participants in 2005 and 2006 could only designate that the recipients of the Pharmaceuticals be either the Choson Kallah Fund of Toronto, Resources for Life Foundation or New Hope Ministries Institute, three registered Canadian charities chosen by the Promoter (the "in kind charities");

(aa) participants received two donation receipts; one from one of the designated charities referred to in paragraph (t) above for the cash payment to the CHT Arrangement, and another from one of the designated charities referred to in paragraph (z) above for the Pharmaceuticals;

Use of cash received through the CHT Arrangement

(bb) in 2005, approximately 9,710 taxpayers participated in the CHT Arrangement;

(cc) in 2006, approximately 10,782 taxpayers participated in the CHT Arrangement;

(dd) the total cash payments made by the participants in each of the 2005 and 2006 years was $79,473,811 and $88,574,577, respectively;

(ee) in 2005 and 2006, the registered Canadian charities involved with the CHT Arrangement retained no more than 3% of the total cash payments by the participants;

(ff) the distribution of the total cash payments made by the participants in the 2005 and 2006 years was as follows:

i) approximately 5% was paid as fees by the registered Canadian charities to the Promoter of the CHT Arrangement;

ii) approximately 37% was paid to Canadian Donations Limited;

iii) approximately 55% was wire transferred to a bank account in Cyprus; and

iv) approximately 3% was retained by the registered Canadian charities.

(gg) $500,000 was set aside in 2004 as a defence fund, in the event of reassessment by the Minister;

(hh) the cash amounts were not paid directly to any of the three registered Canadian charities named in paragraph (t) but were paid to a solicitor's trust account;

(ii) all transactions relating to the CHT Arrangement were pre-arranged, required no input or involvement of the participants other than the cash payment and the execution of certain documents;

(jj) transactions in the CHT Arrangement, such as the issuing of receipts and preparing other necessary paperwork, were performed by the Promoter or other pre-arranged third parties;

The Pharmaceuticals

(kk) participants never took physical possession of, nor acquired title to, any Pharmaceuticals;

(ll) the registered Canadian charities referred to in paragraph (z) never took possession of any Pharmaceuticals in Canada;

(mm) no Pharmaceuticals related to the CHT Arrangement ever entered Canada;

(nn) the CHT Trusts never acquired title to the Pharmaceuticals;

(oo) the Settlor acquired the Pharmaceuticals in bulk from a Cyprian company, KP Innovispharm Limited;

(pp) the Settlor secured the purchase of the Pharmaceuticals by a promissory note and a lien given by the Settlor (the "Lien");

(qq) the Lien was in place at the time participants acquired their Pharmaceuticals and remained in place at the time of the transfer of the Pharmaceuticals;

(rr) the Settlor paid no more for the Pharmaceuticals than the amount of the Lien;

(ss) the fair market value of the Pharmaceuticals at the time the participants transferred them to the registered Canadian charity was no more than what the Settlor paid to KP Innovispharm Limited;

(tt) the Pharmaceuticals were manufactured and purchased in a market outside of Canada and were distributed from the offshore manufacturers to third world countries for the purposes of humanitarian relief;

(uu) the Pharmaceuticals were never intended to be imported into Canada;

(vv) the Pharmaceuticals were never intended to be used by Canadian consumers;

(ww) appraisals of Pharmaceuticals were provided for the purposes of the CHT Arrangement and were commissioned by the Trustee and the designated registered Canadian charities;

(xx) these appraisals do not accurately reflect the fair market value of the Pharmaceuticals;

The Appellant's participation in the CHT Arrangement

(yy) in 2005 the appellant participated in the CHT Arrangement;

(zz) the appellant applied to the Trustee to be a "Class A" beneficiary of the CHT Arrangement and to have pharmaceutical units distributed to him. The application was granted;

(aaa) in support of his application, the appellant made a cash payment of $39, 966 to a law firm ,in trust for the Phoenix Community Works Foundation ;

(bbb) the cash payment referred to in paragraph (aaa) above was a fee the appellant paid in order to participate in the CHT Arrangement;

(ccc) the appellant received from Phoenix Community Works Foundation, two charitable donation receipts, one for $19, 968 dated September 5, 2005 and another for $19,998 dated January 23, 2006;

(ddd) no more than 3.3% of the appellant's $39,966 cash payment was distributed to Phoenix Community Works Foundation;

(eee) the appellant never took possession of, nor acquired titled to, any Pharmaceuticals;

(fff) the appellant signed a Deed of Gift which stated that the appellant transferred Pharmaceuticals acquired through the CHT Arrangement, to Choson Kallah Fund of Toronto;

(ggg) the appellant received from Choson Kallah Fund of Toronto two charitable donation receipts, one for $68,035.70 dated September 20, 2005, and another for $56,423.55 dated February 6, 2006;

(hhh) the fair market value of the Pharmaceuticals did not exceed $39,966, the amount the appellant paid to acquire the Pharmaceuticals; and

(iii) the appellant entered into the CHT Arrangement to secure for himself a tax benefit in excess of his cash payment and not make a charitable gift to a registered Canadian charity.

CITATION:	2018 TCC 220
COURT FILE NOS.:	2008-2759(IT) G, 2008-2779(IT)G 2014-3231(IT)G and 2015-858(IT)G
STYLES OF CAUSE:	V. ROSS MORRISON AND HER MAJESTY THE QUEEN DIETER EISBRENNER AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	April 17 to 20, 2018, April 25 to 27, 2018, April 30 to May 4, 2018, May 14 and May 16, 2018
AMENDED REASONS FOR JUDGMENT BY:	The Honourable Justice John R. Owen
DATE OF JUDGMENT:	November 7, 2018
DATE OF AMENDED JUDGMENT:	**November 23, 2018**

APPEARANCES:

For the Appellant, V. Ross Morrison:	The Appellant himself
For the Appellant, Dieter Eisbrenner:	Shane Greaves, Martin Gentile, Justin Kutyan and Kelly Ng
Counsel for the Respondent:	Ronald MacPhee, Ryan Gellings and Stephen Ji

COUNSEL OF RECORD:

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